HISTORICAL

LAW-TRACTS.

VOLUME. II.

EDINBURGH:
Printed for A. MILLAR, at BUCHANAN's Head in the STRAND, LONDON; and A. KINCAID, and J. BELL, EDINBURGH.
MDCCLVIII.

TRACT VIII.

HISTORY

OF

BRIEVES.

JURISDICTION was originally a mighty ſimple affair. The chieftain who led the hord or clan to war, was naturally appealed to in all controverſies among individuals.

JURISDICTION involved not then what it doth at preſent, *viz.* a privilege to declare what is law, and authority to command obedience. It involved no more than what naturally follows when two per-

ſons differ in matter of intereſt, which is to take the opinion of a third.

THUS a judge originally was merely an umpire or arbiter, and litigation was in effect a ſubmiſſion; upon which account litiſconteſtation is, in the Roman law, defined a judicial contract.

THE chieftain, who afterwards when ſeveral clans united for common defence got the name of King, was the ſole judge originally in matters of importance *. Slighter controverſies were determined by fellow-ſubjects; and perſons diſtinguiſhed by rank or office, were commonly choſen umpires.

BUT

* CÆSAR deſcribing the Germans and their manners. "Quum bellum civitas aut illatum defendit, aut infert; magiſtratus, qui ei bello præſint, ut vitæ neciſque habeant poteſtatem, deliguntur. In pace nullus communis eſt magiſtratus, ſed principes regionum atque pagorum inter ſuos jus dicunt, controverſiaſque minuunt *."

* Commentaria, Lib. 6.

BUT differences multiplying by multiplied connections, and cauſes becoming more intricate by the art of ſubtilizing, the Sovereign made choice of a council to aſſiſt him in his awards; and this council was denominated, *The King's Court;* becauſe in it he always preſided. Through moſt of the European nations, at a certain period of their hiſtory, we find this court eſtabliſhed.

IN the progreſs of ſociety, matters of juriſdiction becoming ſtill more complex, and multiplying without end, the Sovereign, involved in the greater affairs of government, had not leiſure nor ſkill to decide differences among his ſubjects. Law became a ſcience. Courts were inſtituted; and the ſeveral branches of juriſdiction, civil, criminal, and eccleſiaſtical, were diſtributed among theſe courts. Their powers were aſcertained, and the cauſes that could be tried by them. Theſe were likewiſe called the King's courts, not only as being put in place of the King's court properly ſo

ſo called, but alſo as the King did not renounce the power of judging in perſon, but only freed himſelf from the burden of neceſſary attendance.

But the Sovereign, jealous of his royal authority, beſtowed upon theſe courts no other power but that of juriſdiction in its ſtricteſt ſenſe, *viz.* a power to declare what is law. He reſerved to himſelf all magiſterial authority, even that which is neceſſary for explicating the juriſdiction of a court. Therefore, with relation to ſovereign courts, citation and execution proceed in the King's name, and by his ſpecial authority.

As to inferior courts, all authority is given to them that is neceſſary for explicating their juriſdiction. The truſt is not great, conſidering that an appeal lyes to the ſovereign court; and it is below the dignity of the crown, to act in an inferior court.

In the infancy of government, the danger was not perceived, of truſting with the King, both the judicative and executive powers of the law. But it being now underſtood, that the ſafety of a free government depends upon balancing its ſeveral powers, it has become an eſtabliſhed maxim, That the King, with whom the executive part of the law is truſted, has no part of the judicative power. "It ſeems now agreed, "that our Kings having delegated their "whole judicial power to the judges of "their ſeveral courts, they, by the con-"ſtant and uninterrupted uſage of many "ages, have now gained a known and "ſtated juriſdiction, regulated by certain "eſtabliſhed rules, which our Kings them-"ſelves cannot make any alteration in, "without an act of parliament *." The ſame, no doubt, is underſtood to be the law of Scotland, though ſo late as Craig's time it was otherwiſe. That author † mentions

* New abridgement of the law, vol. I. page 554.
† L. 3. Dieg. 7. § 12.

tions a caſe, where it was declared to be law, that the King might judge even in his own cauſe.

RELIGION and law, originally ſimple, were ſtrangers to form. In proceſs of time, form took the place of ſubſtance, and law, as well as religion, were involved in ſolemnities. What is ſolemn and important, produceth naturally order and form among the vulgar, who are addicted to objects of ſenſe. For this reaſon, forms in moſt languages are named ſolemnities, being connected with things that are ſolemn. But by gradual improvements in ſociety, and by refinement of taſte, forms come inſenſibly to be neglected, or reduced to their juſt value; and law as well as religion are verging towards their original ſimplicity. Thus, oppoſite cauſes produce ſometimes the ſame effects. Law and religion were originally ſimple, becauſe man was ſo. They will again be ſimple, becauſe ſimplicity contributes to their perfection.

AFTER courts were inſtituted, and the cognizance of all cauſes at that time known was diſtributed among them, ſeveral new grounds of action occurring, it behoved to be often doubtful, in what court a new action ſhould be tried. An expeditious method was invented, for reſolving doubts of this ſort. The King was the fountain of juriſdiction, and to him was aſcribed the prerogative of delegating to what judge he thought proper, any cauſe of this kind that occurred. This was done by a brieve from the chancery, directed to ſome eſtabliſhed judge, ordering him to try the particular cauſe mentioned in the brieve. The King at firſt was under no reſtraint as to the choice of the judge, other than what aroſe from rational motives; provided only, the party, who was to be made defendant, was ſubjected to the juriſdiction of the judge named in the brieve. This limitation was neceſſary; becauſe the King's brieve contained not a warrant for citing the party to appear before the judge; and the judge's

warrant could not reach beyond his territory. But in time, reaſon produced cuſtom, and cuſtom became law. Matters of moment behoved to be delegated to a ſupreme judge; and, in general, the rule was, to avoid mixing civil and criminal juriſdiction.

In the moſt general ſenſe of the word, every one of the King's writs, commanding or prohibiting any thing to be done, is termed a brieve. But brieves, with reſpect to judicial proceedings, are of two kinds. One is directed to the ſheriff, or a meſſenger in place of the ſheriff, ordering him to cite the party to appear in the King's court, to anſwer the complaint made againſt him. This brieve is, in the Engliſh law, termed an original, and correſponds to our ſummons including the libel. The other kind is that above mentioned, directed to a judge, delegating to him the power of trying the particular cauſe ſet forth in the brieve.

OF the firſt kind of brieve, that for breaking the King's protection, is an inſtance *. Of the other kind, the brieve of bondage, the brieve of diſtreſs, the brieve of mortanceſtry, the brieve of nouvel diſſeiſin, of perambulation, of terce, of right, &c. are inſtances.

OF the laſt mentioned brieve the following was a peculiar ſpecies. When in the King's court a queſtion of baſtardy occurred, to which a civil court is not competent, a brieve was directed from the chancery to the biſhop, to try the baſtardy as a prejudicial queſtion †. If ſuch a caſe happened in an inferior court, the court, probably by its own authority, made the remit to the ſpiritual court. And the ſame being done at preſent in the King's courts, there is no longer any uſe for this brieve.

THE brieve of bondage might be directed either to the juſticiar or to the

 ſheriff *.

* Quon. attach. cap. 54. † Reg. Maj. L. 2. cap. 50.

ſheriff *. The brieve for relief of cautionry, might be directed to the juſticiar, ſheriff, or provoſt and baillies within burgh †. The brieves of mortanceſtry, and of nouvel diſſeiſin, could only be directed to the juſticiar ‡.

THE brieve of diſtreſs, correſponding to the Engliſh brieve, *Juſticies*, muſt be examined more deliberately, becauſe it makes a figure in our law. While the practice ſubſiſted of poinding *brevi manu* for payment of debt, there was no neceſſity for the interpoſition of a judge to force payment ‖. When courts therefore were inſtituted, a proceſs for payment of debt was not known. The rough practice of forcing payment by private power being prohibited, an action became neceſſary; and the King interpoſed by a brieve, directing one or other judge to try the cauſe. "The brieve of diſtreſs "for debts ſhall be determined before the "juſticiar,

* Quon. attach. cap. 56. † Idem. cap. 51. ‡ Idem. cap. 52 & 53. ‖ See Tract IV. *Hiſtory of ſecurities upon land for payment of debt.*

" juſticiar, ſheriff, baillies of burghs, as it " ſhall pleaſe the King by his letter to com- " mand them particularly within their ju- " riſdiction *." And it may be remarked by the way, that when a decree was recovered under the authority of this brieve, the judge directed execution by his own authority, even ſo far as to adjudge to the creditor, for his payment, the land of the debtor, if the moveables were not ſufficient. With regard to the ſheriff at leaſt, the fact is aſcertained by the act 36. p. 1469. This brieve explains a maxim of the common law of England: " Quod placita de catal- " lis, debitis, &c. quæ ſummum 40 *ſh.* at- " tingunt vel excedunt, ſecundum legem " et conſuetudinem Angliæ ſine brevi regis " placitari non debent †." The indulging a juriſdiction to the extent of 40 ſhillings without a brieve, aroſe apparently from the hardſhip of compelling a creditor to take out a brieve for a ſum ſo ſmall. In England

* Reg. Maj. L. 1. cap. 5. † New abridgment of the law, vol. I. page 646.

land the law continues the ſame to this day; for the ſheriff, without a brieve, cannot judge in actions of debt beyond 40 ſhillings. But in Scotland, an original juriſdiction was, by ſtatute, beſtowed upon the Lords of ſeſſion, to judge in actions of debt *; and the ſheriff and other inferior judges, copying after this court, have, by cuſtom and preſcription, acquired an original juriſdiction in actions of debt, without limitation; and the brieve of diſtreſs is no longer in uſe, becauſe no longer neceſſary.

After the ſame manner, moſt of theſe brieves have gone into deſuetude; for to nothing are we more prone than to an inlargement of power. A court, which has often tried cauſes by a delegated juriſdiction, loſes in time ſight of its warrant, and ventures to try ſuch cauſes by its own authority. Some few inſtances there are of brieves ſtill in force, ſuch as theſe which found the proceſs of diviſion of lands, of terce,

* Act 61. p. 1457.

terce, of lyning within burgh, and of perambulation. For this reaſon I think it wrong in the court of ſeſſion to ſuſtain a proceſs of perambulation at the firſt inſtance, which ought to be carried on before the ſheriff, upon the authority of a brieve from the chancery. And what inclines me the rather to be of this opinion, is, that all the brieves of this ſort preſerved in uſe, regard either the fixing of land marches, or the diviſion of land among parties having intereſt, which never can be performed to good purpoſe, except upon the ſpot.

SOON after the inſtitution of the college of juſtice, it was made a queſtion, whether that court could judge in a competition about the property of land, without being authorized by a brieve of right. But they got over the difficulty upon the following conſideration; "That the brieve of right "was long out of uſe; and that this being "a ſovereign and ſupreme court for civil "cauſes, its juriſdiction, which in its na-

"ture

" ture is unlimited, muſt comprehend all " civil cauſes from the loweſt to the " higheſt *."

As the King's writs iſſuing from chancery did paſs under either the Great or the Quarter Seal, ſuch ſolemnity came to be extremely burdenſome, and behoved to be ſeverely felt in the multiplication of law proceedings. This circumſtance was, no doubt, of influence, in antiquating the brieves that conferred a delegated juriſdiction, and in bringing all cauſes under ſome one original juriſdiction. The other ſort of brieve, which is no other than the King's warrant to call the defendant into the King's court, has been very long in diſuſe; and in place of it a ſimpler form is choſen, which is a letter from the King, paſſing under the ſignet, directed to the ſheriff, or to a meſſenger in place of the ſheriff, ordering him to cite the party to appear

* Ult. February 1542, Weems *contra* Forbes, obſerved by Skene (voce) Breve de recto.

appear in court. This change probably happened without an expreſs regulation. A few ſingular inſtances which were ſucceſsful, diſcovered the convenience; and inſtances were multiplied, till the form became univerſal, and brieves from the chancery were altogether neglected. One thing is certain, that letters under the ſignet for citing parties to appear in the King's courts, can be traced pretty far back. In the chartulary of Paiſley, preſerved in the advocates library *, there is a full copy of a libelled ſummons, in Engliſh, dated the 2d February 1468, at the inſtance of George, abbot of Paiſley, againſt the bailies of the burgh of Renfrew, with reſpect to certain tolls, cuſtoms, privileges, &c. for ſummoning them to appear before the King and his council, at Edinburgh, or where it ſhall happen them to be for the time, ending thus: "Given under our ſig-" net at Perth, the ſecond of December, " and of our reign the eight year." And

* Page 246.

there are extant letters under the ſignet *, containing a charge to enter heir to the ſuperiority, and infeft the vaſſal within twenty days; and, if he fail, ſummoning him to appear before the Lords of council the ſeventh of July next, to hear him decerned to tyne his ſuperiority, and that the vaſſal ſhall hold of the next lawful ſuperior. "Given under our ſignet at Stir-"ling, the ſecond of June, and of our "reign the firſt year." It is to be obſerved, at the ſame time, that this muſt have been a recent innovation; for ſo late as the year 1457, the ordinary form of citing parties to appear before the Lords of ſeſſion, was by a brieve iſſued from chancery †.

It is probable, that originally every ſort of execution, which paſſed upon the decrees of the King's courts, was authorized by a brieve iſſuing from chancery; for if a brieve was neceſſary to bring the defendant into

* 2d June 1514. † See act 62. p. 1457.

into court, it is not to be ſuppoſed, that leſs ſolemnity was uſed in executing the decree pronounced againſt him; and that this in particular was the caſe when land was appriſed for payment of debt, is teſtified by 2d ſtatutes Robert I. cap. 19. At what time this form was laid aſide, or upon what occaſion, we know not. For ſo far back as we have any records, we find every ſort of execution, perſonal and real, upon the decrees of the King's courts, authorized by letters paſſing the ſignet.

OF old, a certain form of words was eſtabliſhed for every ſort of action; and if a man could not bring his caſe under any eſtabliſhed form, he had no remedy. In the Roman law, theſe forms are termed *formulæ actionum*. In Britain, copying from the Roman law, all the King's writs or brieves, theſe at leaſt which concern judicial proceedings, are in a ſet form of words, which it was not lawful to alter. But in the progreſs of law, new caſes occurring

without end, to which no eſtabliſhed form did correſpond, the Romans were forced to relax from their ſolemnities, by indulging *actiones in factum*, in which the fact was ſet forth without reference to any form. The Engliſh follow this practice, by indulging *actions upon the caſe*. It is probable, that in Scotland, the warrant for citation paſſing under the Signet, was at firſt conceived in a ſet form, in imitation of the brieve to which it was ſubſtituted. But if this originally was the caſe, the practice did not long continue. Theſe forms have been very long neglected, every man being at liberty to ſet forth his caſe in his own words; and it belongs to the court to conſider, whether the libel or declaration be relevant; or, in other words, whether the facts ſet forth be a juſt cauſe for granting what is requeſted by the purſuer.

TRACT IX.

HISTORY

OF

PROCESS in ABSENCE.

IN Scotland, the forms of proceſs againſt abſents, in civil and criminal actions, differ too remarkably to paſs unobſerved. Our curioſity is excited to learn whence the difference has ariſen, and upon what principle it is founded: and for gratifying our curioſity in this particular, I can think of no means more promiſing, than a view of ſome foreign laws that have been copied by us.

BUT

But in order to underſtand the ſpirit of theſe laws, it will be neceſſary to look back upon the origin of civil juriſdiction, of which I have had occaſion, in a former tract, to give a ſketch *; *viz.* that at firſt judges were conſidered as arbiters, without any magiſterial powers; that their authority was derived from the conſent of the litigants; that litiſconteſtation was in reality a judicial contract; and therefore, that the decrees of judges had not a ſtronger effect than an award pronounced by an arbiter properly ſo called. Upon this ſyſtem of juriſdiction, there cannot be ſuch a thing as a proceſs in abſence; for a judge, whoſe authority depends upon conſent, cannot give judgment againſt any perſon who ſubmits not to his juriſdiction. But civil juriſdiction, like other human inventions, faint and imperfect in its commencement, was improved in courſe of time, and became a more uſeful ſyſtem. After a publick was recognized, and a power in the publick to give

* Hiſtory of the Criminal Law.

give laws to the ſociety, and to direct its operations, the conſent of litigants was no longer neceſſary to found juriſdiction. A judge is held to be a publick officer, having authority from the publick to ſettle controverſies among individuals, and to oblige them to ſubmit to his decrees. The defendant, being bound to ſubmit to the authority of the court, cannot hurt the purſuer by refuſing to appear; and hence a proceſs in abſence againſt a perſon who is legally cited.

IN the primitive ſtate of Rome, juriſdiction was altogether voluntary. A judge had no coercive power, not even that of citation. The firſt dawn of authority we diſcover in old Rome, with relation to judicial proceedings, is a power which was given to the claimant to drag his party into court, *obtorto collo*, as expreſſed in the Roman law. This was a very rude form, ſuitable however to the ignorance and rough manners of thoſe times. This glimpſe of

authority

authority was improved, by transferring the power of forcing a defendant into court, from the claimant to the judge; and this was a natural tranſition, after a judge was held to be a publick officer, veſted with every branch of authority that is neceſſary to explicate his juriſdiction. Litiſconteſtation ceaſed to be a judicial contract. But as our notions do not immediately accommodate themſelves to the fluctuation of things, litiſconteſtation continued to be handled by lawyers as a judicial contract, long after juriſdiction was authoritative, and neither inferred nor required conſent. Litiſconteſtation, it is true, could no longer be reckoned a contract: but then, as any ſubterfuge will ſerve a lawyer, it was defined to be a *quaſi*-contract; which, in plain language, is ſaying, that it hath nothing of a contract except the name. We return to the hiſtory. The power of citation aſſumed by the judge, was at firſt, like moſt innovations, exerciſed with remarkable moderation. The defendant in civil

cauſes

cauſes behoved, for the moſt part, to be cited no fewer than four times, before he was bound to put in his anſwer. The fourth citation was peremptory, and carried the following certification: "Etiam "abſente diverſa parte, cogniturum ſe, et "pronunciaturum *." What followed is diſtinctly explained. "Et poſt edictum pe-"remptorium impetratum, cum dies ejus "ſupervenerit, tunc abſens citari debet: "et ſive reſponderit, ſive non reſponderit, "agetur cauſa, et pronunciabitur: non uti-"que ſecundum præſentem, ſed interdum "vel abſens, ſi bonam cauſam habuit, "vincet †."

IN criminal actions, the form of proceeding againſt abſents, appears not, among the Romans, to have been thoroughly ſettled. Two reſcripts of the Emperor Trajan are founded on, to prove, that no criminal ought to be condemned in abſence. And becauſe a proof *ex parte* cannot afford more

* L. 71. de judiciis. † Ibid. l. 73.

than a ſuſpicion or preſumption, the reaſon given is, "Quod ſatius eſt impunitum re-"linqui facinus nocentis, quam innocentem "damnare." On the other hand, it is urged by ſome writers, that contumacy, which is itſelf a crime, ought not to afford protection to any delinquent; and therefore that a criminal action ought to be managed like a civil action. Ulpian, to reconcile theſe two oppoſite opinions, labours at a diſtinction; admits, as to leſſer crimes, that a perſon accuſed may be condemned in abſence; but is of opinion, that of a capital crime no man ought to be condemned in abſence *. Marcian ſeems to be of the ſame opinion †. And it is laid down, that the criminals whole effects, in this caſe, were inventaried and ſequeſtred; to the effect, that if within the year he did not appear to purge his contumacy, the whole ſhould be confiſcated ‡.

THIS

* l. 5. de pœnis. † l. 1. pr. et § 1. de requir. vel abſen. damnan. ‡ *viz.* in the title now mentioned.

THIS form of proceeding, as to civil actions at leaſt, appears to have a good foundation both in juſtice and expediency. If my neighbour refuſe to do me juſtice, it is the part of the judge or magiſtrate to compel him. If my neighbour be contumacious, and refuſe to ſubmit to legal authority, this may ſubject him to puniſhment, but cannot impair my right. In criminal cauſes, where puniſhment alone is in view, there is more room for heſitating. No individual hath an intereſt ſo ſubſtantial, as to make a proſecution neceſſary merely upon his account; and therefore writers of a mild temper, ſatisfy themſelves with puniſhing the perſon accuſed for his contumacy. Others, of more ſevere manners, are for proceeding to a trial in every caſe which is not capital.

THAT a difference ſhould be eſtabliſhed between civil and criminal actions, in the form of proceeding, is extremely rational. I cannot however help teſtifying ſome de-

gree of ſurpriſe, at an opinion, which gives peculiar indulgence to the more atrocious crimes. I ſhould rather have expected, that the horror mankind naturally have at ſuch crimes, would have diſpoſed theſe writers, to break through every impediment, in order to reach a condign puniſhment; leaving crimes which make a leſs figure, to be proſecuted in the ordinary form. Nature and plain ſenſe undoubtedly ſuggeſt this difference. But theſe matters were at Rome ſettled by lawyers, who are led more by general principles, than by plain ſenſations. And as the form of civil actions, it may be ſuppoſed, was firſt eſtabliſhed, analogy moved them to bring pecuniary mulcts, and conſequently all the leſſer crimes, under the ſame form.

I reckon it no ſlight ſupport to the foregoing reflection, that as to high treaſon, the greateſt of all crimes, the Roman lawyers, deſerting their favourite doctrine, permitted action to proceed upon this crime,

not

not only in abſence of the perſon accuſed, but even after death *.

So far back as we can trace the laws of this iſland, by the help of ancient writings and records, we find judges veſted with authority to explicate their juriſdiction. We find, at the ſame time, the original notion of juriſdiction ſo far prevalent, as to make it a rule, that no cauſe could be tried in abſence; which to this day continues to be the law of England. This rule is unqueſtionably a great obſtruction to the courſe of juſtice. For inſtead of trying the cauſe, and awarding execution when the claim is found juſt, it has forced the Engliſh courts upon a wide circuit of pains and penalties. The refuſing to ſubmit to the juſtice of a court inveſted with legal authority, is a crime of the groſſeſt nature, being an act of rebellion againſt the ſtate. And it is juſtly thought, that the perſon who refuſes to ſubmit to the laws of his country, ought not

* l. 11. ad leg. Jul. majeſt.

not to be under the protection of theſe laws. Therefore, this contempt and contumacy, in civil actions as well as criminal, ſubjects the party to diverſe forfeitures and penalties. He is held to be a rebel or outlaw: he hath not *perſonam ſtandi in judicio:* he may be killed *impune;* and both his liferent and ſingle eſcheat fall *.

In Scotland, we did not originally try even civil cauſes in abſence, more than the Engliſh do at preſent. The compulſion to force the defendant to appear, was attachment of his moveables, to the poſſeſſion of which he was reſtored upon finding bail to ſiſt himſelf in court. If he remained obſtinate, and offered not bail, the goods attached were delivered to the claimant, who remained in poſſeſſion, till the proprietor was willing to ſubmit to a trial. This is plainly laid down in the caſe of the brieve of right, or declarator of property; where, if the defendant remain contumax, and neither appear

* Bacon's new abridg. of the law, Tit. (Outlawry)

appear nor plead an eſſoinzie, the land in controverſy is ſeized and ſequeſtred in the King's hands, there to remain for fifteen days: if the defendant appear within the fifteen days, he recovers the poſſeſſion, upon finding caution to anſwer as law will: otherwiſe the land is adjudged to the purſuer, after which the defendant has no remedy but by a brieve of right *. Neither appears there to be any ſort of cognition in other civil cauſes, ſuch as actions for payment of debt, for performance of contracts, for moveable goods; where the firſt ſtep was to arreſt the defendant's moveables, till he found caution to anſwer as law will †. And in theſe caſes, as well as in the brieve of right, the goods attached were, no doubt, delivered to the claimant, to be poſſeſſed by him while his party remained contumacious.

AFTER the Roman law prevailed in this part of the iſland, the foregoing practice wore

* Reg. Maj. l. 1. cap. 7. † Quon. attach. cap. 1. cap. 49. § 3.

wore out, and, with regard to civil actions, gave place to a more mild and equitable method, which, without ſubjecting the defendant to any penalty, is more available to the purſuer. This method is to try the cauſe in abſence of the defendant, in the ſame manner as was done in Rome, of which mention is made above. The relevancy is ſettled, proof taken, and judgment given, preciſely as where the defendant is preſent. The only inconvenience of this method, upon its introduction, was the depriving the purſuer of the defendant's teſtimony, when he choſe to refer his libel to the defendant's oath. This was remedied by holding the defendant as confeſſed upon the libel. To explain this form, I muſt ſhortly premiſe, that by the old law of this iſland, it was reckoned a hardſhip too great, to oblige a man to give evidence againſt himſelf; and for that reaſon the purſuer, even in a civil action, was denied the benefit of the defendant's teſtimony. In Scotland, the notions of the Roman law prevailing,

prevailing, which, in the particular now mentioned, were more equitable than our old law, it was made a rule, that the defendant in a civil action is bound to give evidence againſt himſelf; and if he refuſe to give his oath, he is held as confeſſing the fact alledged by the purſuer. This practice was at hand to be transferred into a proceſs where the defendant appears not; and from this time, the contumacy of the defendant who obeys not a citation in a civil cauſe, has been attended with no penal conſequence; for a good reaſon, that the purſuer hath a more effectual method for attaining his end, which is to inſiſt, that the defendant be held as confeſt upon the libel. Nor is this a ſtretch beyond reaſon; for the defendant's acquieſcence in the claim may juſtly be preſumed, from his refuſing to appear in court.

BUT this new form is defective in one particular caſe. We hold not a party as confeſt, unleſs he be cited perſonally. What

if one, to avoid a perſonal citation, keep out of the way: is there no remedy in this caſe? why not recur to the ancient practice of attaching his effects, till he find caution to anſwer.

THE Engliſh regulation, that there can be no trial in abſence, holds, we may believe, in criminal as well as in civil cauſes, not even excepting a proſecution for high treaſon. But as this crime will never be ſuffered to go unpuniſhed, a method has been invented, which, by a circuit, ſupplies the defect of the common law. If a party accuſed of treaſon or felony, contumaciouſly keep out of the way, the crime, it is true, cannot be tried: but the perſon accuſed may be outlawed for contumacy; and the outlawry, in ſuch caſes, is made the means to gain the end propoſed by the proſecution. For though outlawry, by the common law, hath no other effect, as above obſerved, than a denunciation upon a horning with us; yet the horror of ſuch offences

hath

hath introduced a regulation beyond the common law, *viz.* that outlawry in the caſe of felony, ſubjects the party to that very puniſhment which is inflicted upon a felon convict; and the like in treaſon, corruption of blood excepted. There is no occaſion to make any circuit with relation to other crimes. For the puniſhment of outlawry, by the common law, equals the puniſhment of any crime, treaſon and felony excepted.

HENCE the reaſon why death before trial is, in England, a total bar to all forfeitures and penalties, even for high treaſon. The crime cannot be tried in abſence; and after death there can be no contempt for not appearing.

LAWYERS have generally but an unhappy talent at reformation; for they ſeldom aim at the root of the evil. In the caſe before us, a ſuperſtitious attachment to ancient forms, hath led Engliſh lawyers into a

glaring abſurdity. To prevent the hazard of injuſtice, there muſt not be ſuch a thing as a trial in abſence of the perſon accuſed. Yet no difficulty is made, to preſume a man guilty in abſence without a trial, and to puniſh him in the ſame manner as if he had been fairly tried and regularly condemned. This is in truth converting a privilege into a penalty, and holding the abſent guilty, without allowing them the benefit of a trial. The abſurdity of this method is equally glaring in another inſtance. It is not ſufficient that the defendant appear in court: it is neceſſary that he plead, and put himſelf upon a trial by his country. The Engliſh adhere ſtrictly to the original notion, that a proceſs implies a judicial contract, and that there can be no proceſs, unleſs the defendant ſubmit to have his cauſe tried. Upon this account, it is an eſtabliſhed rule, that the perſon accuſed who ſtands mute or refuſes to plead, cannot be tried. To this caſe a peculiar puniſhment is adapted, diſtinguiſhed by the name of

peine

peine fort et dure; The perſon accuſed is preſſed to death. And there are inſtances upon record, of perſons ſubmitting to this puniſhment, in order to ſave their land-eſtates to their heirs, which, by the law of England, are forfeited on ſome caſes of felony, as well as on high treaſon. But here again high treaſon is an exception. Standing mute in this caſe is attended with the ſame forfeiture, which is inflicted on a perſon attainted of high treaſon.

WE follow the Engliſh law ſo far as that no crime can be tried in abſence. Some exceptions to this rule were, it is true, for a time, indulged, which ſhall be mentioned by and by. But we at preſent adhere ſo ſtrictly to the rule, that a decree in abſence, obtained by the procurator-fiſcal before an inferior court for a bloodwit upon full proof, was reduced: "The Lords being of opinion, that "a decreet in abſence could not pro-"ceed; and that the judge could go no "further,

" further, than to fine the party for con-
" tumacy, and to grant warrant to appre-
" hend him, till he ſhould find caution to
" appear perſonally *."

It is certainly a defect in our law, that voluntary abſence ſhould be a protection againſt the puniſhment of atrocious crimes. Excepting the crime of high treaſon, with regard to which the Engliſh regulation hath now place with us, the puniſhment of outlawry, whatever the crime be, never goes farther than ſingle and liferent eſcheat.

As to the trial of a crime after death, which, by the Roman law, was indulged in the caſe of treaſon, there are two reaſons againſt it. The firſt and chief is, that whether the crime be committed againſt the publick or againſt a private perſon, reſentment, the ſpring and foundation of puniſhment, ought to be buried with the criminal;

* Dalrymple, 19th July 1715, Procurator-fiſcal *contra* Simpſon.

criminal; and, in fact, never is indulged by any perſon of humanity, after the criminal is no more. The other is drawn from the unequal ſituation of the relations of the deceaſed, who, unacquainted with his private hiſtory, have not the ſame means of juſtification, which to himſelf, as it may be ſuppoſed, would have been an eaſy taſk. Upon this account, the indulging criminal proſecutions after death, would open a door to moſt grievous oppreſſion. In a country where ſuch is the law, no man can be ſecure, that his heirs ſhall inherit his fortune. With reſpect, however, to treaſon, it ſeems reaſonable, that in ſome ſingular caſes it ought to be excepted from this rule. If a man be ſlain in battle, fighting obſtinately againſt an eſtabliſhed government, there is no inhumanity in forfeiting his eſtate after his death: nor can ſuch a privilege in the crown, confined to the caſe now mentioned, be made an engine of oppreſſion, conſidering the notoriety of the fact. And indeed it carries no ſlight air of abſurdity,

dity, that the moſt daring acts of rebellion, *viz.* riſing in arms againſt a lawful ſovereign, and oppoſing him in battle, ſhould, if death enſue, be out of the reach of law: for dying in battle, honourably in the man's own opinion and in that of his aſſociates, can in no light be reckoned a puniſhment. This in reality is a very great encouragement, to perſevere in rebellion. A man who takes arms againſt his country, where ſuch is the law, can have no true courage, if he lay them down, till he either conquer or die. This may be thought a reaſonable apology for the Roman law, which countenanced a trial of treaſon after death, confined expreſly to the caſe now mentioned. " Is, qui in reatu decedit, integri ſtatus " decedit. Extinguitur enim crimen mor- " talitate, niſi forte quis majeſtatis reus " fuit; nam hoc crimine, niſi a ſucceſſo- " ribus purgetur, hereditas fiſco vindicatur. " Plane non quiſquis legis Juliæ majeſtatis " reus eſt, in eadem conditione eſt; ſed " qui perduellionis reus eſt, hoſtili animo

" adverſus

" adverſus rempublicam vel principem ani-
" matus: cæterum ſi quis ex alia cauſa legis
" Juliæ majeſtatis reus ſit, morte crimine
" liberatur *."

THE Roman law was copied, indiſcreetly indeed, by our legiſlature, authorizing, without any limitation, a proceſs for treaſon after the death of the perſon ſuſpected †. But the legiſlature, reflecting upon the danger of truſting with the crown a privilege ſo extraordinary, did, by an act in the year 1542, which was never printed, reſtrain this privilege within proper bounds. The words are: " And becauſe the ſaids Lords
" think the ſaid act (*viz.* the act 1540)
" too general and prejudicial to all the Ba-
" rons of this realm; therefore ſtatutes and
" ordains, that the ſaid act ſhall have no
" place in time coming, but againſt the
" airs of them that notourly committs, or
" ſhall commit crimes of leſe majeſty a-
" gainſt the King's perſon, againſt the

* l. ult. ad leg. Jul. majeſt. † Act 69. p. 1542.

" realm for everting the ſame; and againſt " them that ſhall happen to betray the " King's army, allenarly, it being notourly " known in their time: and the airs of " theſe perſons to be called and purſued " within five years after the deceaſe of " the ſaid perſons committers of the ſaids " crimes: and the ſaid time being bypaſt, " the ſaids airs never to be purſued for " the ſame *."

A proceſs of treaſon againſt an abſent perſon regularly cited, reſts upon a different footing. It is ſome preſumption of guilt, that a man accuſed of a crime, obſtinately refuſes to ſubmit himſelf to the law of his country;

* In the year 1609, Robert Logan of Reſtalrig was, after his death, accuſed in parliament, as acceſſory to the Earl of Gowrie's conſpiracy, and his eſtate was forfeited to the crown; though, in appearance at leaſt, he had died a loyal ſubject, and in fact never had committed any ouvert act of treaſon. Strange, that this ſtatute was never once mentioned during the trial, as ſufficient to bar the proſecution! Whether to attribute this to the undue influence of the crown, or to the groſs ignorance and ſtupidity of our men of law at that period, I am at a loſs. Of one thing I am certain, that there is not to be found upon record, another inſtance of ſuch flagrant injuſtice in judicial proceedings.

country; and yet the dread of injuſtice or of falſe witneſſes, may, with an innocent perſon, be a motive to keep out of the way. This uncertainty about the motive of the perſon accuſed, ought to confine to the higheſt court every trial in abſence, that of treaſon eſpecially, where the perſon accuſed is not upon an equal footing with his proſecutors. And probably this would have been the practice in Scotland, but for one reaſon. The ſeſſions of our parliament of old, were generally too ſhort for a regular trial in a criminal cauſe. Upon this account, the trial of treaſon after death, was, from neceſſity rather than choice, permitted to the court of juſticiary. And this court which enjoyed the greater privilege, could entertain no doubt of the leſs, *viz.* that of trying treaſon in abſence. This latter power however being called in queſtion, the legiſlature thought proper to countenance it by an expreſs ſtatute; not indeed as to every ſpecies of treaſon in general, but only in the caſe of "treaſonable riſing in arms, and open

"and manifeſt rebellion againſt his ma-
"jeſty *."

FROM this deduction it will be manifeſt, that the act 31. p. 1690, reſcinding certain forfeitures in abſence pronounced by the court of juſticiary before the ſaid ſtatute 1669, proceeds upon a miſtake in fact, in ſubſuming, "That before the year 1669, "there was no law impowering the Lords "of juſticiary to forfeit in abſence for per-"duellion." And yet this miſtake is made an argument, not indeed for depriving the court of juſticiary of this power in time coming, but for annulling all ſentences for treaſon pronounced in abſence by this court before the 1669. Theſe ſentences, it is true, proceeding from undue influence of miniſterial power, deſerved little countenance. But if they were iniquitous, it had been ſuitable to the dignity of the legiſlature, to annul them for that cauſe, inſtead of aſſigning a reaſon that cannot bear

* Act 11. p. 1669.

bear a ſcrutiny. However this be, I cannot avoid obſerving, that the juriſdiction of the court of juſticiary to try in abſence open and manifeſt rebellion, was far from being irrational. And it is remarkable, that this was the opinion of our legiſlature, even after the revolution; for though they were willing to lay hold of any pretext to annul a number of unjuſt forfeitures, they did not however find it convenient to abrogate the ſtatute 1669, but left it in full force. Comparing our law in this particular with that of England, it appears to me clear, that the form authorized by the ſaid ſtatute, which gives acceſs to a fair trial, ought to be preferred before the Engliſh form, which annexes the higheſt penalties to an outlawry for treaſon, without any trial.

IT remains only to be obſerved, that the Engliſh treaſon laws, being ſince the union made a part of our criminal law, the foregoing regulations, for trying the crime of treaſon in abſence of the party accuſed or

after

after his death, are at an end; and at preſent, that the rule holds univerſally, that no crime can be tried in abſence. In England, no crime was ever tried in abſence, far leſs after death. The parliament itſelf did not aſſume this power; for an attainder for high treaſon in abſence of the delinquent, proceeds not upon trial of the cauſe, but is of the nature of an outlawry for contumacious abſence. Nor is this form varied by the union of the two kingdoms; for the Britiſh parliament, as to all matters of law, is governed by the forms eſtabliſhed in the Engliſh parliament before the union. At the ſame time, the humanity of our preſent manners, affords great ſecurity, that the treaſon laws will never be ſo far extended in Britain as they have been in Scotland, to forfeit an heir for the crime of his anceſtor. I am not of opinion, that ſuch a forfeiture is repugnant to the common rules of juſtice, when it is confined to the caſe above mentioned; and yet it is undoubtedly more beneficial for the inhabitants of this iſland,

that

that by the mildneſs of our laws ſome criminals may eſcape, than that an extraordinary power, which in perilous times may be ſtretched againſt the innocent, ſhould be lodged even in the ſafeſt hands. The national genius, ſo far from favouring rigorous puniſhments, or any latitude in criminal proſecutions, has the direct oppoſite tendency. There cannot be a ſtronger evidence of this benign diſpoſition, than the late acts of parliament, diſcharging all forfeiture of lands or hereditaments, even for high treaſon, after the death of the Pretender and his two ſons *.

* 7th Ann. 20, and 17th Geo. II. 39.

HISTORY

TRACT X.

HISTORY

OF

EXECUTION againſt MOVEABLES and LAND for payment of debt.

AGAINST a debtor refractory or negligent, the proper legal remedy is to lay hold of his effects for paying his creditors. This is the method preſcribed by the Roman law *, with the following addition, that the moveables, as of leſs importance than the land, ſhould be firſt ſold. But the Roman law is defective,

* l. 15. § 2. de re judic.

in one reſpect that the creditor was diſappointed, if no buyer was found. The defect was ſupplied by a reſcript of the Emperor *, appointing, that, failing a purchaſer, the goods ſhall be adjudged to the creditor by a reaſonable extent.

AMONG other remarkable innovations of the feudal law, one is, that land was withdrawn from commerce, and could not be attached for payment of debt. Neither could the vaſſal be attached perſonally, becauſe he was bound perſonally to the ſuperior for ſervice. The moveables therefore, which were always the chief ſubject of execution, came now to be the only ſubject. In England, attachment of moveables for payment of debt, is warranted by the King's letter directed to the Sheriff, commonly called a *Fieri Facias;* and this practice is derived from common law without a ſtatute. The ſheriff is commanded, " to ſell as many of the debtor's " moveables

* l. 15. § 3. de re judic.

" moveables as will ſatisfy the debt, and to " return the money with the writ into the " court at Weſtminſter." The method is the ſame at this day, without any remedy, in the caſe where a purchaſer is not found.

LAND, when left free to commerce by diſſolution of the feudal fetters, was of courſe ſubjected to execution for payment of debt. This was early introduced with relation to the King. For from the *Magna Charta* *, it appears to have been the King's privilege, failing goods and chattels, to take poſſeſſion of the land till the debt was paid. And from the ſame chapter it appears, that the like privilege is beſtowed upon a cautioner, in order to draw payment of what ſums he is obliged to advance for the principal debtor. By the ſtatute of merchants †, the ſame privilege is given to merchants; and by 13th Edward I. cap. 18. the privilege is communicated to creditors in general; but with the following

* Cap. 8th. † 13th Edward I.

remarkable limitation, that they are allowed to poſſeſs the half only of the land. By this time it was ſettled, that the military vaſſal's power of aliening, reached the half only of his freehold *. And it was thought incongruous, to take from the debtor, by force of execution, what he himſelf could not diſpoſe of even for the moſt rational conſideration. The laſt mentioned ſtatute enacts, "That where debt is recovered, or "knowledged in the King's court, or da-"mages awarded, it ſhall be in the election "of him that ſueth, to have a *fieri facias* "unto the ſheriff, to levy the debt upon "the lands and chattels of the debtor; "or that the ſheriff ſhall deliver to him "all the chattels of the debtor, (ſaving "his oxen and beaſts of his plough) and "the one half of his land, until the debt be "levied upon a reaſonable extent: and if he "be put out of the land, he ſhall recover "it again by writ of nouvel diſſeiſin, and "after that by writ of rediſſeiſin if need be."

The

* See abridgement of ſtatute law, Tit. *Recognition*.

The writ authorized by this ſtatute, which, from the election given to the creditor, got the name of *Elegit*, is the only writ in the law of England, that in any degree correſponds to our appriſing or adjudication. The operations however of theſe two writs are far from being the ſame. The property of the land appriſed or adjudged, is transferred to the creditor in ſatisfaction of his claim, if the debtor forbear to make payment for ten years: but an *elegit* hath no other effect, but to put the creditor in poſſeſſion till the debt be paid, by levying the rents and profits. This is an inconvenient method of drawing payment *: but at the time of the ſtatute, it was probably thought a ſtretch,

* FOR beſides the inconvenience of getting payment by parcels, it is not eaſy for the creditor in compting for the rents to avoid a law-ſuit, which in this caſe muſt always be troubleſome and expenſive. It may alſo happen, that the rent does no more but ſatisfy the intereſt of the money; muſt the creditor in this caſe be ſatisfied with the poſſeſſion, without ever hoping to acquire the property? The common law aſſuredly affords him no remedy. But it is probable, that upon application by the creditor, the court of chancery, upon a principle of equity, will direct the land to be ſold for payment of the debt.

a ſtretch, to ſubject land at any rate to a creditor for his payment. And the Engliſh, tenacious of their cuſtoms, never think of making improvements, or even of ſupplying legal defects; of which this ſtatute affords another inſtance, ſtill greater than that now mentioned. In England, at preſent, land, generally ſpeaking, is abſolutely under the power of the proprietor; and yet the ancient practice ſtill ſubſiſts, confining execution to the half, preciſely as in early times, when the debtor could diſpoſe of no more but the half. Means however are contrived, indirect indeed, to ſupply this palpable defect. Any other creditor is authorized to ſeize the half of the land left out of the firſt execution, and ſo on without end. Thus, by ſtrictly adhering to form without regarding ſubſtance, law, inſtead of a rational ſcience, becomes a heap of ſubterfuges and incongruities, which tend inſenſibly to corrupt the morals of thoſe who make law their profeſſion.

AND here, to prevent miſtakes, it muſt be obſerved, that the clauſe in the ſtatute, bearing, "That the ſheriff by a *fieri fa-* "*cias* may levy the debt upon the land "and chattels of the debtor," authoriſes not the ſheriff to deliver the land to the creditor, but only to ſell what is found upon the land, ſuch as corn or cattle, and to levy the rents which at the time of the execution are due by the tenants.

LETTERS of poinding in Scotland, correſpond to the writ of *Fieri Facias* in England: but the defect above mentioned in the *fieri facias*, is ſupplied in our execution againſt moveables according to its ancient form, which is copied from the Roman law. The execution was in the following manner: "The goods upon the debtor's land, whe- "ther belonging to the maſter or tenant, "are carried to the market croſs of the "head burgh of the ſheriffdom, and there "ſold for payment of the debt. But if a "purchaſer be not found, goods are ap-

"prized

" prized to the value of the debt, and de-
" livered to the creditor for his payment *."
And here it muſt be remarked, that bating the rigour of ſelling the tenant's goods for the landlord's debt, this method is greatly preferable to that preſently in uſe, which enjoins not a ſale of the goods, but only that they be delivered to the creditor at apprized values. This is unjuſt; becauſe in place of money, which the creditor is entitled to claim, goods are impoſed on him, to which he has no claim. But this act of injuſtice to the creditor, is a triffle compared with the wrong done to the debtor by another branch of the execution that has crept into practice. In letters of poinding, a blank being left for the name of the meſſenger, the creditor is impowered to chuſe what meſſenger he pleaſes, and of conſequence to chuſe alſo the appretiators; by which means he is in effect both judge and party. In a practice ſo irregular, what can be expected but an unfair appretiation,

* Quon. attach. cap. 49.

appretiation, always below the value of the goods pointed? And for graſping at this undue advantage, the creditor's pretext is but too plauſible, *viz.* that, contrary to the nature of his claim, he is forced, as I have ſaid, to accept goods in lieu of money. Thus our execution againſt moveables in its preſent form, is irregular and unjuſt in all views. Wonderful, that contrary to the tendency of all publick regulations towards perfection, this ſhould have gradually declined from good to bad, and from bad to worſe! And we ſhall have additional cauſe to wonder, when, in the courſe of this enquiry, it appears, that the indulging to the creditor the choice of the meſſenger and appretiators, has, with reſpect to execution againſt land, produced effects ſtill more pernicious than that under conſideration *.

OUR Kings, it is probable, borrowed from England the privilege of entering upon

* POINDING is put upon a better footing by act of ſederunt, 9th Auguſt 1754.

the debtor's land, for payment of debt. That they had this privilege appears from 2d ſtatutes Robert I. cap. 9. which is copied almoſt word for word from the 8th chapter of the *Magna Charta*. Cautioners had the ſame privilege *, which was extended, as in England, to merchants †. This execution did not entitle the creditor to have the land ſold for payment of the debt, but only to take poſſeſſion of the land, and to maintain his poſſeſſion till the debt was paid; preciſely as in England. But as it has been the genius of our law, in all ages, to favour creditors, a form of execution againſt land for payment of debt, more effectual than that now mentioned, or to this day is known in England, was early introduced into this part of the iſland, which is to ſell land for payment of the debt, in the ſame manner that moveables were ſold. The brieve of diſtreſs, failing moveables, is extended to the debtor's land, which is appointed to be ſold by the ſheriff for payment of

* Ibid. cap. 10. † Ibid. cap. 19.

of the debt *. Nor was this execution reſtricted to the half as in England; for our forefathers were more regardful of the creditor than of the ſuperior. And though this originally might be a ſtretch, it happens luckily to be perfectly well accommodated to the preſent condition of land-property, which, for the moſt part, is not more limited than the property of moveables.

BUT here a defect will be obſerved in Alexander's ſtatute, that no proviſion is made in caſe a purchaſer be not found; the leſs excuſable that the legiſlature had before their eyes a perfect model, in the form preſcribed for the attachment of moveables.

THERE are words in this ſtatute to occaſion a doubt, whether attachment of land for payment of debt, was not an earlier practice in our law. The words are: "The "debtor not ſelling his lands within fifteen "days, the ſheriff and the King's ſervants

* Stat. Alex. II. cap. 24.

" ſhall ſell the lands and poſſeſſions pertain-
" ing to the debtor, *conform to the conſuetude*
" *of the realm*, until the creditor be ſatisfied
" of the principal ſum, with damage, ex-
" pence, and intereſt." But theſe words, *Conform to the conſuetude of the realm*, ſeem to refer to the form of ſelling moveables. For I ſee not what other regulation was introduced by the ſtatute, if it was not ſelling of land for payment of debt. And conſidering the circumſtances of theſe times, when the feudal law was ſtill in vigour, and the commerce of land but in its infancy, we cannot rationally aſſign an earlier date to this practice.

In England, the ſtatute of merchants was neceſſary to creditors, who at that period had not acceſs to the land of their debtors. But as in Scotland every creditor had acceſs to the land of his debtor, it will be expected that ſome account ſhould be given, why the ſtatute of merchants was introduced here. What occurs is, that the chief

view of the Scotch ſtatute, was to give acceſs to the debtor's perſon, which formerly could not be attached for payment of debt. And when ſuch a novelty was introduced, as that of giving execution againſt the perſon of the debtor, againſt his moveables, and againſt his land, all at the ſame time, it was probably thought ſufficient, to give ſecurity upon the land for payment of the debt, without proceeding to a ſale.

IT appears from our records, that ſometimes land was ſold for payment of debt upon the above mentioned ſtatute of Alexander II. and ſometimes that ſecurity only was granted upon the land by authority of the ſtatute of merchants. Of the latter, one inſtance occurs upon record, in a ſeiſin dated 29th January 1450; and many ſuch inſtances are upon record down to the time that general appriſings crept into practice.

IT is ſaid above, that the ſtatute of Alexander II. is defective, in not providing a remedy

a remedy where a purchaſer is not found. But this defect was ſupplied by our judges; and land, failing a purchaſer, was adjudged to the creditor by a reaſonable extent; which, without a ſtatute, was done by analogy of the execution againſt moveables. Of this there is one preciſe inſtance in a charter, dated 22d July 1450, a copy of which is annexed *. And thus we find, that what is properly called a decreet of appriſing, was introduced into practice before the ſtatute 1469, though that ſtatute is by all our authors aſſigned as the origin of appriſings. But it appears from the ſtatute itſelf, compared with former practice, that nothing elſe was in view, but to limit the effect of the brieve of diſtreſs with reſpect to tenants, that there ſhould not be execution againſt their goods for the landlord's debt, farther than to the extent of a term's rent. And becauſe it was reckoned a hardſhip on a debtor conſidered as landlord, to have his land taken from him, neglecting the

* N°. 6th.

the moveable goods upon the land; therefore a ſweetning privilege is beſtowed on him, of redeeming the land within ſeven years. But this regulation was attended with an unhappy conſequence, probably not foreſeen. It rendered ineffectual the moſt uſeful branch of the execution, *viz.* the ſelling land for payment of the debt. For no perſon will chuſe to purchaſe land under reverſion, while there is any proſpect of coming at land without an embargo. This ſtatute therefore, inſtead of giving a beginning to appriſings of land, did in reality reduce them to a form leſs perfect than they had originally.

ONE ſalutary regulation was introduced by this ſtatute. By the former practice, no bounds being ſet to the time of compleating the execution, it was left to the diſcretion of the ſheriff, to delay as long as he pleaſed for a purchaſer. To ſupply this defect, it was enacted, "That if a purchaſer be not "found in ſix months, the ſheriff muſt pro-

"ceed

"ceed to appriſe land, and to adjudge it "to the creditor."

In no particular are the different manners of the two nations more conſpicuous, than in their laws. The Engliſh, tenacious of their cuſtoms, have, from the beginning, preſerved their forms entire with little or no variation. The Scotch, delighting in change, have been always attempting or indulging innovations. By this propenſity, many articles of our law are brought to a reaſonable degree of perfection. But by the ſame propenſity, we are too apt to indulge relaxation of diſcipline, which has bred a profuſion of ſlovenly practice in law-matters. The following hiſtory will juſtify the latter part of this reflection.

During a vacancy in the office of ſheriff, or even when the ſheriff was otherwiſe employed, it appears to have been early the practice of the King's courts, to name a ſubſtitute for executing any particular affair;

affair; and this ſubſtitute was called *The ſheriff in that part.* Within thirty years of the ſtatute 1469, there are examples of letters of appriſing, directed to meſſengers at arms, as *ſheriffs in that part.* Theſe letters, we may believe, were at firſt not permitted without a ſufficient cauſe: but ſlighter and ſlighter cauſes being ſuſtained, heretable ſheriffs took the alarm, and obtained an act of parliament *, "diſcharging commiſ-
" ſions to be given in time coming for ſerv-
" ing of brieves, or appriſing of lands, but
" to the judge ordinary, unleſs *cauſa cognita*
" upon calling the judge ordinary to object
" againſt the cauſe of granting." But this ſtatute did not put an end to the abuſe. The practice was revived of naming meſſengers at arms as ſheriffs in that part, for executing letters of appriſing, till at the long run it became an eſtabliſhed cuſtom, to direct all letters of appriſing to theſe officers.

* Act 82. p. 1540.

APPRISING of land, being an execution by the ſheriff, behoved of conſequence to be within the county. But the ſubſtitution, as aforeſaid, of meſſengers, who are not connected with any particular county, paved the way to the infringement of a regulation neceſſarily derived from the very nature of the execution. The firſt inſtance on record, of permitting the court of appriſing to be held at Edinburgh, is in the year 1582. The reaſon given for a ſtep ſo irregular was, that the debtor's lands lay in two ſhires. And as Edinburgh by this time was become the capital of the kingdom, where the King's courts moſt commonly were held, and where every landed gentleman was ſuppoſed to have a procurator to anſwer for him, it was reckoned no wide ſtretch, to hold courts of appriſing at Edinburgh for the whole kingdom. From this period downward, inſtances of holding courts of appriſing at Edinburgh, multiply upon us; and this came to be conſidered as a matter of right, without neceſſity of

aſſigning

aſſigning any cauſe for demanding a diſpenſation, or at leaſt without neceſſity of verifying the cauſe aſſigned.

THIS ſubſtitution of a meſſenger in place of the ſheriff, produced another effect, not leſs irregular than that now mentioned, and much more pernicious to debtors. In letters of poinding, as obſerved above, a blank is left for the name of the meſſenger: the ſame is the form of letters of appriſing; and by this means, in both executions equally, the creditor has the choice of the meſſenger, and conſequently of the appretiators. Thus, by obtaining the court of appriſing to be held at Edinburgh by a judge choſen at will, the creditor acquired the abſolute direction of the execution againſt land, and, preciſely as in the execution againſt moveables, became in effect both judge and party. It will not be ſurpriſing, that the groſſeſt legal iniquity was the reſult of ſuch ſlovenly practice. Creditors taking the advantage of the indulgence given them, exerted their

power with ſo little reſerve, as to graſp at the debtor's whole land-eſtate, without the leaſt regard to the extent of the debt. In ſhort, without uſing ſo much as the formality of an appretiation, it became cuſtomary, to adjudge to the creditor every ſubject belonging to the debtor that could be carried by this execution; for which the expence of bringing witneſſes to Edinburgh from diſtant ſhires to value land, and the difficulty of determining the value of real burdens affecting land, were at firſt the pretext.

As there is no record of appriſings before the year 1636, we are not certain of the preciſe periods of theſe ſeveral innovations. The only knowledge we have of appriſings before that time, is from the King's charters paſſing upon appriſings; which is a very lame record, conſidering how many appriſings muſt have been led, that were not compleated by charter and ſeiſin. But imperfect as this record may be, we find ſeveral charters in the 1607, 1608, 1613, 1614,

1614, &c. paſſing upon theſe general appriſings.

IT cannot but appear ſtrange, that ſuch groſs relaxation of eſſential forms, and ſuch robbery under colour of law, were not checked in the bud by the ſovereign court. Yet we find nothing of this kind attempted, though the remedy was at hand. There was no occaſion for any new regulation. It would have been ſufficient to reſtore the brieve of diſtreſs to its original principles. All exceſſes however promote naturally their own cure; which is the moſt remarkable in avarice when exorbitant. Theſe general appriſings, by their frequency, became a publick nuſance paſt all enduring. The matter was brought under conſideration of parliament, and a ſtatute was made, by far too mild. For inſtead of cutting down general appriſings root and branch, as illegal and oppreſſive, the exorbitant profits were only pruned off; and it was enacted *, "That "the

* Act 6. p. 1621.

" the rents intromitted with by the credi-
" tor, if more than ſufficient to pay his an-
" nualrent, ſhall be applied towards extinc-
" tion of the principal ſum."

It muſt not eſcape obſervation, that by this new regulation, an appriſing is in effect moulded into quite a new form, much leſs perfect than it was originally; for from being a judicial ſale, it is reduced to the nature of a judicial ſecurity, or a *pignus prætorium*, approaching much nearer than formerly to the Engliſh *elegit*.

An attempt was made by act 19. p. 1672. to reſtore ſpecial adjudications, but unſucceſsfully. It might have been forſeen, without much penetration, that no debtor will voluntarily give off land ſufficient to pay the debt claimed, and a fifth part more, reſerving a power of redemption for five years only, when his refuſal ſubjects him to no harder alternative, than to have his whole lands impledged for ſecurity of the neat ſum due,

due, with a power of redemption for ten years. It had been an attempt more worthy of the legiſlature, to reſtore the brieve of diſtreſs, by appointing land to be ſold, upon application of any ſingle creditor, for payment of his debt. But nothing of this kind was thought of, till the year 1681, when a ſtatute was made, authoriſing a ſale of the debtor's whole eſtate, in caſe of inſolvency. This regulation, which was brought to greater perfection by later ſtatutes, is, after all, an imperfect remedy; becauſe it only takes place where the debtor is bankrupt. And hence it is, that by the preſent law of Scotland, there is no effectual means for obtaining payment out of the debtor's land-eſtate, unleſs he be inſolvent. Being familiarized with this regulation, it doth not diſguſt us; but it probably will ſurpriſe a ſtranger, to find a country, where the debtor's inſolvency affords the only effectual means his creditors have to obtain payment by force of law.

UPON

UPON the whole, it is a curious morſel of hiſtory that lies before us. In the firſt ſtages of our law, we had a form of execution for drawing payment of debt, perfect in its kind, or ſo nigh perfection, as ſcarce to be ſuſceptible of any improvement. It has been the operation of ages, to alter, change, innovate, and relax from this form, till it became grievous and intollerable. New moulded by various regulations, it makes at preſent a better figure. But with all the improvements of later times, the beſt that can be ſaid of it is, that, though far diſtant, it approacheth nearer to its original perfection, than at any time for a century or two paſt. And for the publick good, nothing remains for the legiſlature, but to review the brieve of diſtreſs in its original ſtate, with reſpect to moveables as well as land; admitting only ſome alterations that are made neceſſary by change of circumſtances, ſuch as the preſent independency of tenants, and their privilege to hold property diſtinct from their landlords.

TRACT XI.

HISTORY

OF

PERSONAL EXECUTION

for payment of debt.

THE ſubjects that ly open to execution for payment of debt, are, 1ſt, The debtor's moveables. 2dly, His land. And, 3dly, His perſon. The two former being diſcuſſed in the tract immediately foregoing, we proceed to the hiſtory of the latter. Perſonal execution for payment of debt, was introduced after execution againſt land, and long after execution againſt moveables. Nor will this appear ſingular, when

we conſider, that the debtor's perſon, cannot, like his land or moveables, be converted into money for payment of debt. And with regard to a vaſſal in particular, his perſon cannot regularly be withdrawn from the ſervice he owes his ſuperior. This would not have been tolerated while the feudal law was in vigour, and came to be indulged in the decline of that law, when land was improved, and perſonal ſervices were leſs valued than pecuniary caſualties *. The firſt ſtatute in this iſland introducing perſonal execution is, 11th Edward I. which, as appears from the preamble, was to ſecure merchants and encourage trade. It is directed againſt the inhabitants of royal burrows,

* AMONG the ancient Egyptians, payment was taken out of the debtor's goods; but the body of the debtor could not be attached. An individual, upon account of a private debt, could not be withdrawn from the ſervice he owed to the publick, whether in peace or war. Our author Diodorus Siculus * mentions, that Solon eſtabliſhed this law in Athens, freeing all the citizens from impriſonment for debt. And he adds, that ſome did juſtly blame many of the Grecian lawmakers, who forbade arms, ploughs, and other things neceſſary for labour, to be taken as pledges, and yet permitted the perſons who uſed theſe inſtruments to be impriſoned.

* Book 1. Ch. 6.

rows, and "ſubjects, in the firſt place, their "moveables and burgage lands to be ſold "for payment of the debt due to the mer- "chant. And failing goods, the body of "the debtor is to be taken and kept in "priſon till he agree with his creditor. "And if he have not wherewith to ſu- "ſtain himſelf in priſon, the creditor ſhall "find him in bread and water." An additional ſecurity is introduced by 13th Edward I. "If the debtor do not pay the "debt at the day, the magiſtrates, upon "application of the creditors, are obliged "to commit him to the town-priſon, there "to remain upon his own expence until "payment. If the debtor be not found "within the town, a writ is directed to "the ſheriff of the ſhire where he is, to "impriſon him. After a quarter of a year "from the time of his impriſonment, his "goods and lands ſhall be delivered to the "merchant by a reaſonable extent, to hold "them till the debt is levied, and his body "ſhall remain in priſon, and the merchant

"ſhall find him bread and water." This latter ſtatute was adopted by us *; and our ſtatute, I preſume, is the foundation of the act of warding peculiar to royal burrows: for this execution is preciſely in terms of the ſtatute.

As this was found a ſucceſsful expedient for obtaining payment of debt, it was thereafter extended to all creditors †. And thus in England, the creditor may, if he pleaſes, begin with attaching the perſon of his debtor, by a writ named *Capias ad ſatisfaciendum*, the ſame with an act of warding in Scotland againſt inhabitants of royal burrows. But as this act of Edward III. was not adopted by our legiſlature, there is to this day with us no authority for a *capias ad ſatisfaciendum*, except in the ſingle caſe above mentioned of an act of warding.

IT is a celebrated queſtion in the Roman law, touching obligations *ad facta præſtanda*, whether

* 2d ſtat. Rob. I. cap. 19. † 25th Edward III. cap. 17.

whether the debtor be bound ſpecifically to perform, or whether he be liable *pro intereſſe* only. It is at leaſt the more plauſible opinion, that a man is bound according to his engagement; and after all, why indulge to the debtor an option to pay a ſum, in place of performing that work to which he bound himſelf without an option? The perſon accordingly who becomes bound *ad factum præſtandum*, is not with us indulged in an alternative. If he refuſe when he is able to perform, it is underſtood an act of contumacy and diſobedience to the law. This is a ſolid foundation for the letters of four forms, which formerly were iſſued upon obligations *ad facta præſtanda*. And this execution was at the ſame time abundantly moderate: for it is worthy to be remarked, that there is not in theſe letters a ſingle injunction but what is in the obligor's power to perform. The ultimate injunction is, "To perform his obli-
"gation, or to ſurrender his perſon to
"ward, under the penalty, that otherwiſe
"he

"ſhall find him bread and water." This latter ſtatute was adopted by us *; and our ſtatute, I preſume, is the foundation of the act of warding peculiar to royal burrows: for this execution is preciſely in terms of the ſtatute.

As this was found a ſucceſsful expedient for obtaining payment of debt, it was thereafter extended to all creditors †. And thus in England, the creditor may, if he pleaſes, begin with attaching the perſon of his debtor, by a writ named *Capias ad ſatisfaciendum*, the ſame with an act of warding in Scotland againſt inhabitants of royal burrows. But as this act of Edward III. was not adopted by our legiſlature, there is to this day with us no authority for a *capias ad ſatisfaciendum*, except in the ſingle caſe above mentioned of an act of warding.

IT is a celebrated queſtion in the Roman law, touching obligations *ad facta præſtanda*, whether

* 2d ſtat. Rob. I. cap. 19. † 25th Edward III. cap. 17.

whether the debtor be bound ſpecifically to perform, or whether he be liable *pro intereſſe* only. It is at leaſt the more plauſible opinion, that a man is bound according to his engagement; and after all, why indulge to the debtor an option to pay a ſum, in place of performing that work to which he bound himſelf without an option? The perſon accordingly who becomes bound *ad factum præſtandum*, is not with us indulged in an alternative. If he refuſe when he is able to perform, it is underſtood an act of contumacy and diſobedience to the law. This is a ſolid foundation for the letters of four forms, which formerly were iſſued upon obligations *ad facta præſtanda*. And this execution was at the ſame time abundantly moderate: for it is worthy to be remarked, that there is not in theſe letters a ſingle injunction but what is in the obligor's power to perform. The ultimate injunction is, "To perform his obli-" gation, or to ſurrender his perſon to " ward, under the penalty, that otherwiſe

" he

"he ſhall be denounced rebel." If the obligor ſurrendered his perſon to priſon, the will of the letters was fulfilled, and no further execution did proceed. If he was contumacious, by refuſing both alternatives, his diſobedience to the law was juſtly held an act of rebellion, to ſubject him to be denounced or declared rebel *. And perhaps this execution was rather too mild; for the man who refuſeth to perform his engagement, when it is in his power, may in great juſtice be declared a rebel, without admitting any alternative, ſuch as delivering his perſon to ward.

OBLIGATIONS for payment of money, were viewed in a different light. If a man failed to pay his debt, the failure was preſumed to proceed from inability, not obſtinacy. Therefore, unleſs ſome criminal circumſtance was qualified, the debtor was not ſubjected to any ſort of puniſhment. His

* See in the Appendix, No. 7. a copy of letters of four forms.

His land and moveables lay open to be attached by poinding, appriſing, and arreſtment, and theſe were in this caſe the only remedies provided to the creditor. The Engliſh have adopted very different maxims. Impriſonment upon failure of payment, whether conſidered as a puniſhment or a compulſion, muſt proceed upon the ſuppoſition of contumacy and unwillingneſs to pay. For upon the ſuppoſition of inability, without any fault on the debtor's part, it is not only repugnant to the plaineſt principles of law, to puniſh him with loſs of liberty, but an abſurd regulation, tending to no good end. Therefore the *capias ad ſatisfaciendum* in England, muſt be founded upon the preſumption of unwillingneſs to pay. This appeared to us a harſh preſumption, as it is frequently wide of the real fact; and therefore we forbore to adopt the Engliſh ſtatute. But experience taught our legiſlature, that failure in making payment proceeds from obſtinacy or idleneſs, as often as from inability: nay, in many inſtances,

inſtances, debtors were found ſecreting their effects, in order to diſappoint their creditors; and there was encouragement to deal in ſuch fraudulent practices, when debtors were in all events ſecure againſt perſonal execution. Theſe conſiderations produced the act of ſederunt 1582. It is ſet forth in the preamble, "That the defect of perſonal execution upon liquid grounds of debt was heavily complained of; becauſe, after great charge and tedious delay in obtaining decreet, the creditors were often diſappointed of their payment, by ſimulate and fraudulent alienations made by the debtors, of their lands and goods, whereby execution upon ſuch decreets was altogether fruſtrated:" therefore appointed, "That letters of horning, as well as of poinding, ſhall be directed upon decreets for liquid ſums, in the ſame manner as formerly given upon decreets *ad facta præſtanda.*" And this act of ſederunt is ratified by the act 139. p. 1584.

THERE

THERE is not in the law of any country a ſtronger inſtance of harſhneſs, I may ſay of brutality, than occurs in our preſent form of perſonal execution for payment of debt; where the debtor, without ceremony, is declared a rebel, merely upon failure of payment. To puniſh a man as a rebel, who, by misfortunes, or be it bad œconomy, is rendered inſolvent, betokens the moſt ſavage and barbarous manners. One would imagine love of riches to be the ruling paſſion, in a country where poverty is the object of ſo great puniſhment. It is true, the cruelty of this execution is ſoftened by practice, as it could not poſſibly ſtand its ground againſt every principle of humanity. It is a ſubject however of curioſity, to enquire how this rigorous execution crept in. The act 1584, juſt now mentioned, gives no countenance to it: for the letters of four forms to be iſſued by that ſtatute upon decrees for payment of debt, are by no means ſo rigorous as our hornings are at preſent. Theſe letters, as

above explained, impoſe no other hardſhip upon the debtor, than to oblige him to ſurrender his perſon in ward if he doth not pay. This indeed is a ſtretch, but a moderate one, which the uncertainty whether failure of payment proceeds from unwillingneſs or inability, may juſtify. But upon ſuch an uncertainty, to declare a debtor rebel, unleſs he pays, is a brutal practice, which can admit of no excuſe. If indeed the debtor who does not pay, refuſe to put himſelf in priſon, this is a contempt of authority, for which he may be juſtly declared rebel. The queſtion then is, what it was that produced an alteration ſo rigorous in the form of this execution, that a debtor, in place of being denounced rebel upon failing to go to priſon, is denounced rebel upon failing to make payment, when it is often not in his power to make payment?

IN handling this curious ſubject, we muſt be ſatisfied to grope our way in the dark paths of antiquity, almoſt without a guide.

And

And when we travel this road, the firſt thing we diſcover is, that letters of four forms were not the only warrant for perſonal execution upon *facta præſtanda*. By the act 84. p. 1572, touching the deſignation of a manſe and glebe to the miniſter, letters of horning are ordered to be directed by the privy council, to charge the poſſeſſor to remove within ten days, under the pain of rebellion, without any alternative, ſuch as that of ſurrendering his perſon in ward. And indeed this alternative would be abſurd, where a fact is commanded to be done that cannot conveniently admit of delay. Obligations *ad facta præſtanda* ariſing *ex delicto*, were, I preſume, attended with the like ſummary execution. And I have ſeen one inſtance of this, *viz.* letters of horning, *anno* 1573, againſt a perſon who had been guilty of a ſpuilzie, commanding, that he ſhould be charged to redeliver the ſpuilzied goods within eight days, under the penalty or certification of being denounced rebel. Thus, though no

execution was awarded upon civil contracts *ad facta præſtanda* other than letters of four forms, yet, I preſume, that upon ſuch obligations ariſing *ex delicto*, horning, properly ſo called, upon one charge *, was commonly the execution. And as to obligations introduced by ſtatute, the manner of execution is generally directed in the ſtatute itſelf.

I have made another diſcovery, that the alternative of ſurrendering the perſon in ward, was not always the ſtile of letters of four forms. On the contrary, when letters of four forms proceeded upon a delict, as they ſometimes did, I conjecture, that the foregoing alternative was left out. My authority

* LETTERS of horning mean a letter from the King, ordering or commanding the debtor to make payment, under the pain of being proclaimed a rebel. The ſervice of this letter upon the debtor, is named a Charge of Horning. If the debtor diſobey the charge, he is denounced or proclaimed a rebel: and becauſe of old, a horn ſerved the ſame purpoſe in proclamations that trumpets do at preſent, therefore the ſaid letter has by cuſtom, though improperly, obtained the name of Letters of Horning, and the ſervice of the letter has obtained the name of a Charge of Horning.

authority is, the act 53. p. 1572, "ordering letters to be direct by the Lords of "council in all the four forms, charging "excommunicated perſons to ſatisfy the "kirk, under the pain of rebellion," without any ſuch alternative as ſurrendering the perſon in ward.

THOUGH horning be a generic term, comprehending letters of four forms, as well as horning properly ſo called, as is clear from the above mentioned ſtatute 1584, appointing a decree for a liquid ſum to be made effectual by letters of four forms which there paſs under the general name of horning, yet, generally ſpeaking, when horning is mentioned in our old ſtatutes, it is underſtood to be horning upon one charge, in oppoſition to letters of four forms. And it is a rule without exception, that wherever horning is ordained to proceed upon a ſingle charge, the alternative of ſurrendering the perſon in ward, is underſtood to be excluded. For where the common number of charges is

remitted

remitted in order to force a ſpeedy perfor-mance, it would be abſurd to put it in the power of the perſon charged, to evade per-formance by going to priſon.

THE operations of our law were origi-nally ſlow and tedious. There behoved to be four citations before a man could be effectually brought into court, and there behoved to be four charges before a man could be effectually brought to give obedi-ence to a decree pronounced againſt him. The inconveniency was not much felt in the days of idleneſs; but when induſtry prevailed, and the value of labour was un-derſtood, the multiplicity of theſe legal ſteps became intolerable. The number of citations were reduced to two, authorized by the ſame warrant, and at laſt a ſingle citation was made ſufficient. It is probable, that the charges neceſſary to be given upon decrees, did originally proceed upon four diſtinct letters or warrants, which being found unneceſſary, and that one letter or

warrant

warrant might be a ſufficient authority for the four charges, the form was changed according to the model of the letters of four forms lateſt in uſe. At the ſame time, where diſpatch was required, as upon obligations *ad facta præſtanda* ariſing *ex delicto*, and upon ſtatutory obligations, one charge inſtead of four was made ſufficient. But theſe different forms of execution were confined to obligations *ad facta præſtanda*. And with relation to all of them, not excepting the moſt rigorous, it muſt be remarked, that they did not exceed rational bounds. The obligor was in no caſe declared a rebel, unleſs where he was guilty of a real contempt of legal authority, by refuſing to do ſome act which he had power to perform.

WE next proceed to unfold the origin of perſonal execution upon bonded debts, which probably will give light to the preſent enquiry. There is no ground to ſuppoſe, that perſonal execution was known in this

this iſland before the reign of Edward I. In England it was introduced by two ſtatutes, which were adopted by us. This has already been mentioned; as alſo that in England, by a ſtatute of Edward III. every perſon who is debtor in a ſum of money is ſubjected to perſonal execution; which was not adopted by us. Now, though our law gave no authority for perſonal execution, except againſt inhabitants of royal burrows, yet a hint was taken to make this execution more general by conſent. While money was a ſcarce commodity, and while the demand for it was greater than could be readily ſupplied, monied men, taking advantage of that circumſtance, introduced a practice of impoſing upon borrowers hard conditions, which were ingroſſed in the inſtrument of debt. One of theſe was, that in caſe of failing to make payment, perſonal as well as real execution ſhould iſſue, And letters of four forms were accordingly iſſued: though it may be a doubt, whether, in ſtrict law, a

private

private paction be a ſufficient foundation for ſuch execution, which being of the nature of a puniſhment, cannot juſtly be inflicted where there is no crime. But by this time we had begun to reliſh the Engliſh notion, that the failing to make payment proceeds generally from unwillingneſs, and not from inability: and upon that ſuppoſition the execution was materially juſt, though ſcarce well founded on law. This practice however gained ground, without attention to ſtrict principles; and it came to be eſtabliſhed, that conſent is a ſufficient foundation for perſonal execution.

BUT the rigour of money-lenders did not ſtop here. They were not ſatisfied with letters of four forms, becauſe the dreadful commination of being declared rebel, might in all events be evaded by the debtor's ſurrendering his perſon in ward. Nothing leſs would ſuffice, than to have the moſt rigorous execution at command, ſuch as was in practice upon an obligation *ad factum*

præſtandum, ariſing *ex delicto*. And thus in bonds for borrowed money, it became cuſtomary to provide, that, inſtead of letters of four forms, letters of horning ſhould proceed upon a ſingle charge, commanding the debtor to make payment, under the penalty of being declared a rebel, without admitting the alternative of going to priſon. At the ſame time, the debtor commonly was charged to make payment within ſo few days, as not even to have ſufficient time for the performance, however willing or ready he might be. The rigour of theſe pactions was in part repreſſed by the act 140. p. 1592; particularly with reſpect to the time of performance: but perſonal execution upon obligations for debt was left untouched, as was alſo the form of this execution upon a ſingle charge, attended with the penalty of rebellion upon failing to make payment.

IN this manner crept in perſonal execution upon bonded debts, which in practice

was

was ſo thoroughly eſtabliſhed, as to be iſſued without ceremony upon conſenting in general, "that executorials might pro-"ceed in form as effeirs." One inſtance of this appears in the record, *viz.* letters of four forms, John Lawſon *contra* Sir John Stewart and his ſon, dated the 7th May 1582, and recorded 16th Auguſt thereafter. But probably letters of horning, properly ſo called, upon a ſingle charge, were never iſſued unleſs in purſuance of an explicite conſent.

IT may juſtly be preſumed, that the practice of perſonal execution upon bonded debts paved the way to the above mentioned act of ſederunt 1582. For after perſonal execution upon decrees of conſent for payment of money was once eſtabliſhed, it was a natural extenſion to give the ſame execution upon decrees for payment of money obtained *in foro contentioſo*.

IT only remains to be obſerved, with reſpect to perſonal execution upon decrees *in*

foro contentioſo, that it has always been underſtood an extraordinary remedy; and therefore that it requires the ſpecial interpoſition of the ſovereign authority. This authority is obtained by an order directed to the keeper of the King's ſignet, iſſuing from any of his proper courts, ſuch as the ſeſſion, juſticiary, or privy council, when it was in being; for the King interpoſes his authority of courſe, for executing the ordinances of his own courts. But as he condeſcends not to execute the ordinances of any other court, therefore no inferior judge or magiſtrate can give warrant for letters of horning, not even the judge of the court of admiralty, nor the commiſſaries of Edinburgh, neither of which properly are the King's courts. The method formerly in uſe for procuring perſonal execution upon the decrees of ſuch courts, was to obtain from the court of ſeſſion a decree of interpoſition, commonly called a *Decreet conform*, which being a decree of a ſovereign court, was a proper foundation for letters of horning. But this

method

method gave place to one more expeditious, as we ſhall ſee anon.

IF this ſketch of the origin of perſonal execution with reſpect to debt, be but roughly drawn, let the deficiency of materials plead my excuſe. Luckily there is not the ſame ground of complaint in the following part of the hiſtory, every article of which is clearly vouched. The firſt ſtatute abridging letters of four forms upon decrees *in foro contentioſo*, is the act 181. p. 1593, "authoriſing letters of horning containing "a ſingle charge of ten days, to proceed "upon decreets of magiſtrates within burgh, "without the neceſſity of letters conform." Letters of horning, properly ſo called, upon a ſingle charge being here introduced in place of letters of four forms, the known tenor of ſuch letters removed all ambiguity, and made it evident, that the legiſlature intended, the debtor ſhould be denounced rebel upon failing to make payment, without admitting the alternative of ſurrendering

rendering his perſon in ward. Here is a monſter of a ſtatute, repugnant to humanity and common juſtice. But by this time, the alternative of being denounced rebel upon failing to make payment, founded on conſent, was familiar; and if ſuch execution could be founded on conſent, it was reckoned, as would appear, no wide ſtretch to give the ſame execution upon a decree *in foro contentioſo*. This however is no ſufficient apology for extending a harſh practice, which ought rather to have been totally aboliſhed. But the influence of cuſtom is great; and our legiſlature ſubmitted to its authority without due deliberation; not only in this ſtatute, but in others, which paſt afterwards of courſe, extending this regulation to the decrees of other inferior courts *. It may juſtly be a matter of ſurpriſe, how it is poſſible, that ſtatutes ſo contradictory to every principle of equity and humanity, could make their way

* Act 10. p. 1606. Act 6. p. 1607. Act 15. p. 1609. Act 7. p. 1612.

way and be tamely ſubmitted to. To account for this, I muſt obſerve, that the ſame thing happened here that conſtantly happens with relation to harſh and rigorous laws. Such laws have a natural tendency to diſſolution; and even where they are ſupported by the authority of a ſettled government, means are never wanting in practice to blunt their edge. Thus, though the law was ſubmitted to, which annexed the penalties of rebellion to the guilt of preſumed diſobedience, when poſſibly at bottom there was no fault, yet no judge could be ſo devoid of common humanity, as willingly to give ſcope to ſuch penalties. A diſtinction was ſoon recognized betwixt treaſon or rebellion, in the proper ſenſe of the word, and the conſtructive rebellion under conſideration, termed civil rebellion; and it came to be reckoned oppreſſive and diſgraceful, to lay hold of any of the penalties attending the latter. In this manner civil rebellion loſt its ſting, firſt in practice, and now with regard to ſingle and

liferent

liferent eſcheat, by a Britiſh ſtatute *. For though the law was ſcarce ever put in execution to make theſe penalties effectual, yet as upon ſome occaſions they were uſed as a handle for oppreſſion, it was thought proper to aboliſh them altogether.

IN the mean time, letters of four forms continued to be the only warrant for perſonal execution, upon decrees of the court of ſeſſion. But this court, eſteeming it a ſort of impeachment upon their dignity, to be worſe appointed than inferior courts are with reſpect to perſonal execution, took upon them † to aboliſh letters of four forms, and to appoint the ſame letters of horning to paſs upon their own decrees, that by ſtatute were authorized to paſs upon decrees of inferior courts. That decrees of the ſupreme court ſhould at leaſt be equally privileged with thoſe of inferior courts, is a propoſition that admits not a diſpute. I cannot however, without indignation, reflect

* 20th Geo. II. 50. † Act of ſederunt 1613.

reflect upon the preamble of the act of ſederunt, aſſerting, that letters of horning, properly ſo called, are a form of execution leſs burdenſome upon debtors than letters of four forms; which is a bold attempt to impoſe upon the common ſenſe of mankind.

To compleat this ſhort hiſtory, there only remains to be added in point of fact, that to obtain a warrant for perſonal execution, it is ſcarce ever neceſſary, as our law now ſtands, to apply to the court of ſeſſion for a decree of interpoſition. By the regulations 1563, concerning the commiſſary court, a more curt method was introduced, for obtaining letters of horning upon the precepts of the commiſſaries of Edinburgh; which is, that the court of ſeſſion, upon an application to them by petition, ſhould inſtantly iſſue a warrant for letters of horning. And the ſame method was preſcribed in all the ſtatutes above mentioned, that authorized letters of horning upon decrees of inferior courts.

WHEN we compare our form of perſonal execution with that of England, we perceive a wide difference. In England, the *capias ad ſatisfaciendum* is a writ directed to the ſheriff, to impriſon the perſon of the debtor, until he give ſatisfaction to his creditor; of which the conſequence is, that payment made by the debtor intitles him of courſe to his liberty. But in Scotland, an act of warding excepted, a debtor is not committed to priſon upon account merely of his failing to make payment. He muſt be denounced rebel before a *capias* or caption can be iſſued. At the ſame time, this *capias* is not *ad ſatisfaciendum:* it is built upon a different foundation. Impriſonment is one of the penalties of rebellion, and our *capias* is iſſued againſt the perſon, not as debtor but as rebel. The debtor accordingly, by the words of our caption, muſt remain in priſon, "till he be "relaxed from the proceſs of horning;" that is, obtain the King's pardon for his rebellion. For this reaſon it is, that tendering

dering the ſum due, is not, in ſtrict law, ſufficient to ſave the debtor from priſon. Nor after impriſonment will he be entitled to his freedom upon tendering the ſum, till he alſo obtain letters of relaxation. The court of ſeſſion indeed diſpenſed with this formality in ſmall debts, "declaring the "creditor's conſent ſufficient for the "debtor's liberation, when the ſum ex-"ceeds not 200 merks *."

* Act of ſederunt, 5th February 1675.

TRACT XII.

HISTORY

OF

EXECUTION for obtaining payment after the death of the debtor.

IN handling this ſubject, I cannot hope fully to gratify the reader's curioſity otherwiſe than by traceing the hiſtory of this branch of law from remote ages. It will be neceſſary not only to gather what light we can from the rules of common juſtice, but alſo to examine the laws of England and of old Rome, which have been copied by us in different periods.

THE

THE great utility of money, as a commercial ſtandard, made it from the time of its introduction a deſirable object. It came itſelf to be one of the principal ſubjects of commerce, and of contracts of loan. When money is lent, it is the duty of the debtor to pay the ſum at the term covenanted; and to procure money by a ſale of his goods, if he cannot otherwiſe ſatisfy his creditor. If the debtor be refractory or negligent, it is the duty of the judge to interpoſe, and to direct a ſale of the goods, in order that the creditor may draw his payment out of the price.

IN what manner debts are to be made effectual after the debtor's death, by the rules of common juſtice, is a ſpeculation more involved. One thing is obvious, that if no perſon claim the property of the goods as heir, or by other legal title, the creditors ought to have the ſame remedy that they had during their debtor's life. In this caſe there is required no ſtretch of

authority.

authority. On the contrary, when a debtor's goods after his death are ſold for payment of his debts, the law is no further exerted than to ſupply the defect of will, which, it is preſumed, the debtor would have interpoſed had he been alive; whereas when a debtor's goods are ſold during his life, by publick authority, his property is wreſted from him againſt his will.

But now an heir makes his appearance, and the property is transferred to him by right of ſucceſſion. Juſtice will not allow him to enjoy the heritage of his anceſtor, without acknowledging his anceſtor's debts. Therefore, if he ſubmit not to pay the whole debts, one of two things muſt neceſſarily follow, either that he account to the creditors for the value of the heritage, or that he conſent to a ſale for their behoof. Juſtice, as appears to me, cannot be fulfilled but by purſuing the latter method; and my reaſons for thinking ſo are two. The firſt is, that by natural juſtice creditors have

have acceſs to the effects only of their debtor, and have no claim againſt his iſſue or other relations; and therefore that theſe effects ought to be ſurrendered to the creditors for their payment, unleſs the heir, by making full payment, put an end to the claim which the creditors have to theſe effects. The next is, that ſale, which is the only unexceptionable method for determining the value of a commercial ſubject, ought for that reaſon to be preferred by judges, before the more uncertain opinion of witneſſes. For the *prætium affectionis* of the heir, ſuppoſing the thing, ought not to weigh againſt the more ſolid intereſt of creditors, who are *certantes de damno evitando;* not to mention that an heir, who hath an affection for the ſubject, may gratify his affection, by offering the ſmalleſt ſum above what another eſteems the intrinſick value.

The Romans, with reſpect to heirs, had a peculiar way of thinking, which muſt be explained,

explained, becauſe it relates to the ſubject under conſideration. An heir, in the common ſenſe of mankind, is that perſon, who, by blood or by will, is entitled to the effects of a perſon deceaſed; and the ſucceſſion of an heir is a method eſtabliſhed by law, for veſting in a living perſon effects which belonged to another at his death. Hence it is, that, with reſpect to different ſubjects, the ſame perſon may have different heirs; as for example, an heir of blood may ſucceed to ſome ſubjects, and an heir by will to others. The idea of an heir, in the Roman law, is not derived from the right of ſucceeding to the heritage in general, or to any particular ſubject, but reſts upon a very different foundation. The Roman people were diſtinguiſhed into tribes or *gentes*. A tribe was compoſed of different *familiæ*, and a *familia* of different *ſtirpes;* and while the republick ſtood, it was one great branch of their police, to preſerve names and families diſtinct from each other. To perpetuate old families,

the privilege of adoption was beſtowed upon thoſe who had not children. The perſon adopted, who aſſumed the name of the family, came in place of a natural ſon, and had all the privileges that by law belong to a natural ſon. This branch of the Roman police produced a ſingular conception of an heir, *viz.* the bearing the name of the family, and continuing the chain of the family in place of the perſon deceaſed. The ſucceſſion of an heir among the Romans had no relation to property, was not conſidered as a right of ſucceeding to ſubjects, but as a right of ſucceeding to the perſon deceaſed, of coming in his place, of repreſenting him, and of being, as termed in the Roman law, *eadem perſona cum defuncto*. In a word, an heir, in the Roman law, is he who repreſents the deceaſed perſonally; and the repreſenting the deceaſed with reſpect to ſubjects of property, doth not leſs or more enter into the Roman definition of an heir. Nor was it at all neceſſary that this circumſtance ſhould enter the definition: it

was

was ſufficient that every benefit of ſucceſſion was the unavoidable conſequence of perſonal repreſentation; which obviouſly is the caſe. If an heir is *eadem perſona cum defuncto*, ſucceſſion, in the eye of law, makes no change of perſon, and conſequently not even a change of property. Hence the maxim in the Roman law, that *Nemo poteſt mori pro parte teſtatus et pro parte inteſtatus*. For if an heir was adopted or named, his perſonal repreſentation of the teſtator entitled him of courſe to every ſubject, and every privilege that belonged to the teſtator.

THIS ſingular notion of an heir, among the Romans, gave creditors a benefit which they have not by common juſtice. The death of their debtor, if he was repreſented by an heir, made no alteration in their affairs. A debtor who had a repreſentative, died not in a legal ſenſe; his exiſtence was continued in his heir, without change of perſon. The heir accordingly was ſubjected

to all the debts, whether he had or had not any benefit by the ſucceſſion; and if the heir proved dilatory or refractory, his whole effects might be ſold for payment, as well what belonged properly to himſelf, as what he acquired by ſucceſſion. This undoubtedly was a ſtretch beyond the rules of common juſtice; for creditors ought not to gain by the death of their debtor, and an heir ought not to ſuffer by his ſucceſſion. But to palliate this injuſtice, an heir had a year to deliberate whether he ſhould accept of the ſucceſſion; and if he made it his choice to accept, and to run all hazards, which ſometimes produced loſs inſtead of gain, this, being his own choice, was reckoned no ſuch hardſhip as to deſerve a remedy. But this notion of an heir, beneficial to the creditors in one reſpect, was hurtful to them in another. For where the heir's proper debts exceeded his own funds, his creditors had acceſs to the funds of the anceſtor, which were now become their debtor's property by ſucceſſion. Here was real injuſtice done

done to the anceſtor's creditors; which in courſe of time was remedied by the Prætor. He decreed a *ſeparatio bonorum*, and authorized the anceſtor's funds to be ſold for payment of his debts *.

THE groſs injuſtice of ſubjecting an heir to the debts of the anceſtor without limitation, produced in time another remedy, *viz.* the benefit of inventory, by which, upon making an exact liſt of the anceſtor's effects, an exception in equity was given to the heir, to protect him from being further liable perſonally than to the value of the goods contained in the liſt. Whether this value was to be aſcertained by the opinion of witneſſes, or whether the heir was bound to ſell the goods for payment of the anceſtor's debts, is not clear. But the latter ſeems to have been the rule, as may be gathered, not only from the reaſon of the thing, but from the conſtitution of Juſtinian introducing this remedy †. And in our

* l. 1. § 1. de ſeparationibus. † l. 22. § 4 & 8. C. de jure delib.

our practice, though an heir who has the benefit of inventory, is not liable perſonally beyond the value of the goods in the inventory, to be aſcertained by a proof, yet if the creditors chuſe to take themſelves to the goods for their payment, it is in their power to bring the ſame to ſale, and to lay hold of the price for their payment.

But however far the Roman law ſtrayed from the common rules of juſtice, where the debtor's heritage was claimed by an heir, the ſame complaint does not ly in the caſe of inſolvency, where the heir abandoned the ſucceſſion; for the debtor's goods were in this caſe ſold for payment of his debts, in the ſame manner as when he was alive. It is true, that among the Romans, remarkable originally for virtue and temperance, it was ignominious for a citizen to have his effects ſold by publick authority. To prevent ſuch diſgrace, it was common to inſtitute a ſlave as heir, who, after the teſtator's death, being obliged to enter, the hereditary

hereditary ſubjects were ſold as his property, and the real debtor's name was not mentioned *.

We proceed to the Engliſh law, which in all probability was antiently the ſame with our own. And to underſtand the ſpirit of that law, it muſt be premiſed, that while the feudal law was in its purity, a vaſſal had no land-property: he had only the profits of the land for his wages; and when he died, his ſervice being at an end, there could no longer be a claim for wages. The ſubject returned to the ſuperior, and he drew the whole profits, till the heir appeared; who was entitled by the original covenant, upon performing the ſame ſervice with his anceſtor, to demand poſſeſſion of the land as his wages. If his claim was found juſt, the poſſeſſion was delivered to him by a very ſimple form, *viz.* an order or precept from the

* Inſtit. de hered. qualit. et diff. § 1. Heineccius antiquit. L. 2. Tit. 17, 18, 19. § 11.

the ſuperior to give him poſſeſſion; and this was called *renovatio feudi*. There is nothing to be laid hold of, in any branch of this proceſs, for making the heir liable to the anceſtor's debts. By performing the feudal ſervices, every heir is entitled to the full enjoyment of the land in name of wages; and his right being thus limited, he hath no power of diſpoſal, or of contracting debt to affect the ſubject farther than his own intereſt reaches. The next heir who ſucceeds is not liable to the predeceſſor's debts; becauſe the land is delivered to the next heir, not as the predeceſſor's property, but as the property of the ſuperior; and poſſeſſion is given to the next heir as wages, for the ſervice he hath undertaken to perform. From this ſhort ſketch it muſt be evident, that, while the feudal law ſubſiſted in its purity, a vaſſal's debts after his death, however effectual againſt his moveables, could not burden the land, nor the heir who ſucceeded to the land.

BUT after land was reſtored to commerce, and a vaſſal was underſtood to be in ſome ſort proprietor, ſo as even to have a power of alienation, it was a natural conſequence, that the land, as his property, ſhould be ſubjected for payment of his debts, not only during his life, but even after his death. And indeed if a man's moveables can, after his death, be attached for payment of his debts, why not his land; ſuppoſing him equally proprietor of both? Accordingly by the law of England, "Judg-" ments of all kinds, whether *in foro con-* " *tentioſo*, or by conſent, may be made ef-" fectual by an *elegit*, after the debtor's " death, as well as during his life, without " neceſſity of taking a new judgment a-" gainſt the heir *." A judgment by the law of England hath ſtill greater force. " Lands are bound from the time of the " judgment, ſo that execution may be of " theſe, though the party aliens *bona fide*,

* New abridgment of the law, vol. II. page 337.

"before execution ſued out*." For if an *elegit* can be taken out, to attach land conveyed after the judgment to a *bona fide* purchaſer, it is not ſo great a ſtretch to make it attach land after the debtor's death, in the hand of the heir, or *in hereditate jacente*, if the heir be not entered.

THE ſame method takes place in other debts, upon which there is no judgment againſt the debtor; with this only variation, that the creditor muſt begin with taking a decree againſt the heir; becauſe the authority of a decree is neceſſary for execution. The decree taken againſt the heir is, in this caſe, of the nature of a decreet of cognition with us, to be a foundation for attaching the deceaſed debtor's heritage, but not to have any perſonal effect againſt the heir, nor againſt his proper eſtate †.

NOR

* New abridgment of the law, vol. II. page 361. † Ibid. vol. III. page 25.

NOR is it difficult to diſcover the foundation of this practice. It depends on a principle of juſtice, which is ſimple and obvious, that every man's proper effects ought to be applied for payment of his debts. His death can have no ſuch effect naturally, as to withdraw theſe effects from his creditors: nor can it have ſuch effect as to ſubject the heir, who ought not to be liable for debts not of his own contracting; unleſs ſo far as he converts to his own uſe the anceſtor's effects, which are the only fund deſtined by law for payment of the anceſtor's debts.

THE natural principle which prevails in England, that an heir is not ſubjected to his anceſtor's debts, but only the anceſtor's own funds, produced another effect, which is, to veſt in the heir the property of the anceſtor's heretable eſtate, even without exerting any act of poſſeſſion. The very ſurvivance of the heir gives him, in the law-language of England, legal ſeiſin, that

is, gives him all the advantages of real poſſeſſion; and juſtly, becauſe his *animus poſſedendi* is preſumed, and muſt always be preſumed, where the apprehending poſſeſſion is attended with no riſk. This is the ſenſe of the maxim, *Quod mortuus ſaſit vivum*, which obtains in France as well as in England; and of which we now ſee the foundation. This branch of the law of England, is not more beautiful by its ſimplicity, than by its equity and expediency. Nothing can be more ſimple or expedient, than by mere ſurvivance, to veſt in the heir the eſtate that belonged to the anceſtor; and nothing can be more equitable than a *ſeparatio bonorum*, by which the funds of the anceſtor are ſet apart for payment of his debts, without vexing the heir, who, in common juſtice, ought not to be liable but for debts of his own contracting.

We have great reaſon to preſume as to this matter, that our law was once the ſame with that of England, though we have now

now adopted different maxims, deviating far from natural equity, and from the ſimplicity and expediency of the Engliſh law. That our law was the ſame will readily be believed, when in this country of old we find the ſame effect given to judgments, that at preſent is given in England. In the 2d ſtatute Robert I. cap. 19. § 12. it is laid down with reſpect to debts due to merchants, "That in execution againſt the "lands of the debtor, ſaſine ſhall be given "of all the lands which belonged to the "debtor at the time of entering into the "recognizance, in whoſe ever hands they "have ſince come, whether by infeftment "or otherwiſe." This authority, it is true, relates to a decree of conſent; but we are not to ſuppoſe, that it was more privileged than a judgment *in foro contentioſo*; and if ſo, there could be no difficulty of making a judgment effectual againſt the debtor's land, in the hands of his heir, or *in hereditate jacente*. And we find traces of this very thing in our old law. In the above

mentioned

mentioned 2d ſtatutes Robert I. § ult. it is enacted, "That if a debtor die, the mer-"chant creditor ſhall not have his body, "but ſhall have execution againſt his "lands, as there above laid down;" that is by a brieve out of the chancery directed to the ſheriff, to deliver to the creditor all the goods and lands which belonged to the debtor, by a reaſonable extent. The like execution is authorized, Leg. Burg. cap. 94. even where the heir is entered. But this is not all: we have poſitive evidence, that ſuch was the practice in Scotland even after the beginning of the ſixteenth century. There is upon record a charter of appriſing, *anno* 1508, in favour of Richard Kine, who having been decerned to pay 20 *l.* as cautioner for Patrick Wallance, obtained letters after Patrick's death for appriſing his land. Patrick's heirs were edictally cited, and his land was appriſed and adjudged to Richard, for payment to him of the ſaid ſum; and this was done without any previous decree againſt

the

the heir, or charge to enter. A copy of this charter is annexed *; and upon ſearching the records, many more of the ſame kind may doubtleſs be found. In a matter of ſuch antiquity, theſe authorities ought to convince us, that as to execution againſt a debtor's land-eſtate after his death, our old law was the ſame with the Engliſh law, and the ſame that continues to be the Engliſh law to this day.

And if ſuch was the law of Scotland with reſpect to execution after the debtor's death, upon decrees whether *in foro* or of conſent, we can have no reaſonable doubt that the ſame form of execution did obtain where there was no judgment during the debtor's life; with this variation only, that there behoved to be a decree of cognition before execution could be awarded.

A man who treads the dark paths of antiquity, ought to proceed with circumſpection,

* Appendix, No. 8.

ſpection, and be conſtantly on the watch. We have entertained hitherto little doubt about the right road; but in proſecuting our journey, appearances are not quite ſo favourable. We ſtumble unluckily upon the act 106. p. 1540, which ſeems to pronounce, that far from proceeding in the right path, we have been wandering this while. In this ſtatute it appears to be taken for granted, that if the heir avoided entering to the land, the anceſtor's creditors had no means to recover payment. Nay, a remedy is provided, by entitling them to appriſe the land after charging the heir to enter. The act, it is true, is conceived in terms ſo ambiguous, as to make it doubtful whether the remedy concerns the creditors of the anceſtor or thoſe of the heir. But that it is calculated to relieve the former only, all our authors agree. And we have a ſtill greater authority, *viz.* the act 27. p. 1621, which proceeding upon the narrative, that the ſaid ſtatute regards the creditors only of the deceaſed,

extends

extends the ſame remedy to creditors of the heir. This, in effect, is declaring, not only that the creditors of the heir, before the 1621, had no execution againſt the anceſtor's land unleſs the heir their debtor was pleaſed to enter; but alſo, that not even the creditors of the anceſtor had, before the act 1540, any execution againſt the land unleſs the heir, who was not their debtor, was pleaſed to enter.

THESE are weighty authorities in ſupport of the ſenſe univerſally given to the ſtatute 1540. And yet that the common law of Scotland, ſhould impower every heir of a land-eſtate, by abſtaining from the ſucceſſion, to forfeit the creditors of his anceſtor, is a propoſition too repugnant to the common principles of juſtice to gain credit. This propoſition will appear ſtill more abſurd, by bringing the ſuperior into the queſtion. The land returned to him, if the heir did not ſubmit to be his vaſſal: but a good underſtanding betwixt them, perhaps for a

valuable conſideration, might entitle the heir to hold the land in defiance of all the creditors. To accompliſh a ſcheme ſo fraudulent, no more was neceſſary but a private agreement, that the land ſhould return to the ſuperior by eſcheat, and be afterwards reſtored to the heir by a new grant. A contrivance ſo groſsly unjuſt would not have been tolerated in any country. We had appriſings of land as early as the reign of Alexander II. I have demonſtrated above, that it is no ſtretch of legal authority, to iſſue this execution after the debtor's death more than during his life, and that the heir hath no title to prevent this execution whether he be entered or not entered. Let it further be conſidered, that, by our oldeſt law, the heir was liable even for moveable debts, where the moveables were deficient *. What then was to bar law from taking its natural courſe? It is certain there lay no bar in the way; and the neceſſity of ſuch an execution

* Reg. Maj. L. 2. cap. 39. § 3.

cution muſt have been obvious to the meaneſt capacity, in order to fulfil the rules of common juſtice; not to mention its utility for ſupporting credit and extending commerce.

But it is loſing time, to argue thus at large about the conſtruction of a ſtatute. The above mentioned charter 1508 makes it clear, that the ſtatute cannot relate to the creditors of the anceſtor. By that charter it is vouched, that in the 1508, execution againſt the debtor's eſtate proceeded after his death, with as little ceremony as during his life. The practice muſt have been the ſame in the 1540, and therefore as the creditors of the deceaſed had no occaſion for a remedy, the remedy provided by the ſtatute muſt have been intended for the creditors of the heir. And to fortify this conſtruction, there is luckily diſcovered another remarkable fact. Our ſovereign court, ſo far from doubting of the privilege that creditors have to attach

the land-eſtate of their debtor after his death, ventured to authorize an appriſing of the predeceſſor's eſtate upon the debt even of the heir-apparent. One inſtance of this I find in a charter of appriſing, 24th May 1547, granted by Queen Mary to the Maſter of Semple. This charter ſubſumes, "That the Earl of Lennox, in "order to protect his family-eſtate from "being attached for payment of a debt "due by him perſonally to the Queen, "had refuſed to enter heir to the ſaid "eſtate; that he had been charged to en-"ter heir within twenty one days, under "certification, that the lands ſhould be ap-"priſed as if he were really entered: and "that he having diſobeyed the charge, the "lands were accordingly appriſed, &c.*" The date of the charge to enter is omitted in the charter; but that it muſt have been before the ſtatute 1540, is evident from the following circumſtances, that the ſtatute is not mentioned in the charter; and that the charge

* See a copy of this charter, Appendix, No. 9.

charge is upon twenty one days, which ſhows that it proceeded not upon the authority of the ſtatute; for in that caſe the charge muſt have been on forty days. We have no reaſon to ſuppoſe this to be a ſingular inſtance; nor is it mentioned in the charter as ſingular. Here then is diſcovered an important link in the hiſtorical chain, to wit, that a charge againſt the heir to enter at the inſtance of his own creditor, was introduced by the ſovereign court, without the authority of a ſtatute. And if this hold true, the act 1540 could not be intended for any other effect, but to confirm this former practice, with the ſingle variation, that the charge to enter ſhould be upon forty days in place of twenty one. Viewing this curious fact in its true light, it affords convincing evidence, that before the 1540, the debtor's death did not bar his creditors from acceſs to his eſtate. For it is not conſiſtent with the natural progreſs of improvements, that the common law ſhould be ſtretched in favour of the creditors

ditors of the heir-apparent; while the predeceſſor's own creditors, whoſe connection with his eſtate is incomparably ſtronger, were left without a remedy. Theſe creditors muſt have been long ſecure, before a remedy would be thought of for remoter creditors, *viz.* thoſe of the heir-apparent.

But in combating the authority of the ſaid act 1621, we muſt not reſt ſatisfied with ſuch proofs as may be reckoned ſufficient in an ordinary caſe. I add therefore other proofs, that will probably be thought ſtill more direct. In the firſt edition of the ſtatutes of James V. bearing date 8th February 1541, the title prefixed to the ſtatute under conſideration is in the following words: "The remeid againſt them "that lye out of their lands, and will not "enter in defraud of their creditors." This clearly ſhows what was underſtood to be the meaning of the ſtatute at the time it was enacted, *viz.* that it reſpects the creditors ſolely of the heir-apparent. And

the

the ſame title is alſo prefixed to the next edition, which was in the 1566. The other proof I have to mention, appears to be altogether deciſive. Upon ſearching the records, it is diſcovered, that the firſt charges given by authority of the ſtatute, were at the inſtance of creditors of heirs-apparent; one of them as early as the year 1542. This I take to be demonſtrative evidence of the intendment of the ſtatute; for we cannot indulge ſo wild a thought, as that our judges, the very perſons probably who framed this ſtatute, were ignorant of its meaning.

As the foregoing arguments and proofs ſeem to be invincible, we muſt acknowledge, however unwillingly, that our legiſlature, when they made the act 1621, were, in one particular, ignorant of the law of their own country. They are not however altogether without excuſe. I ſhall have occaſion immediately to ſhow, that long before the year 1621, the old form of execution

cution againſt land after the death of the debtor, ſimple and eaſy as it was, had been abandoned, and another form ſubſtituted, not leſs tedious than intricate, which, conſidered in a ſuperficial view, might lead our legiſlature into an opinion, that the creditors of the heir-apparent were not provided for by the ſtatute 1540. In fact they adopted this erroneous opinion, which moved them to make the act 1621.

No ſort of ſtudy contributes more to the knowledge of law, than that which traces it through its different periods and changes. Upon this account, the foregoing enquiry, though long, will, it is hoped, not be thought tedious or improper. In reality it is not practicable, with any degree of perſpicuity, to handle the preſent ſubject, without firſt aſcertaining the true purpoſe of the act 1540. For according to the interpretation commonly received, how ridiculous muſt the attempt appear, of tracing from the beginning the form by

which

which debts are made effectual after the death of the debtor, where the heir renounces or avoids entering; while it remains an eſtabliſhed opinion, that creditors were left without a remedy till the ſtatute was made.

HAVING thus paved the way, by removing a great deal of rubbiſh, I proceed to unfold the principles that govern our preſent form of attaching land and other heretable ſubjects after the death of the debtor.

IT is a matter which cannot rationally admit of a doubt, that our notion of an heir was once the ſame with what is ſuggeſted by the common principles of law, *viz.* one who by will or by blood is entitled to ſucceed to the heritage of a perſon deceaſed, wholly or partially. Nay, we have the ſame notion at preſent, with reſpect to all heirs who ſucceed in particular ſubjects, ſuch as an heir of conqueſt,

an heir male, an heir of entail, an heir of proviſion. Nor is there the leaſt reaſon or occaſion to view even an heir of line in a different light. For what more proper definition of an heir of line, than the perſon who ſucceeds by right of blood to every heretable ſubject belonging to the deceaſed, which is not by will provided to another heir? And yet, with reſpect to the heir of line, we have unluckily adopted the artificial principles of the Roman law, of a perſonal repreſentation, and of identity of perſon, according to the Roman fiction, that the heir is *eadem perſona cum defuncto*. The Roman law, illuſtrious for its equitable maxims, deſerves juſtly the greateſt regard. But the bulk of its inſtitutions, however well adapted to the civil polity of Rome, and the nature of its government, make a very motley figure when grafted upon the laws of other nations. In this country, ever famous for love of novelty, the prevailing eſteem for the Roman law, has been confined within no rational bounds. Not

ſatisfied with following its equitable maxims, we have adopted its peculiarities, even where it deviates from the common principles of juſtice. The very inſtance now under conſideration, without neceſſity of making a collection, is ſufficient to juſtify this reflection. No man can heſitate a moment, to prefer the beautiful ſimplicity and equity of our old law concerning heirs, before the artificial ſyſtem of the Romans, by which an heir cannot demand what of right belongs to him, without hazarding all he is worth in this world. No regulation can be figured more contradictory to equity and expediency: and yet ſuch has been the influence of the Roman law, that as far as poſſible, we have relinquiſhed the former for the latter; that is, with reſpect to general heirs; for as to heirs of conqueſt, heirs of proviſion, and all heirs who ſucceed to particular ſubjects, their condition is ſo oppoſite to that of an heir in the Roman law, that it is impoſſible, by any ſtretch of fancy, to apply the Roman fiction to them.

THIS unlucky fiction, which ſuppoſes the heir and anceſtor to be the ſame perſon, hath produced that intricate form preſently in uſe, for recovering payment of debt after the death of the debtor. The creditors originally had no concern with the heir: their claim lay againſt their debtor's effects, which they could directly attach for their payment, whether *in hereditate jacente* or in the hands of the heir. But when the maxim of repreſentation and identity of perſon came to prevail, the whole order of execution was reverſed. By the heir's aſſuming the character of repreſentative, and by becoming *eadem perſona cum defuncto*, the anceſtor's effects are withdrawn from his creditors, and are veſted in the heir as formerly in the anceſtor. In a ſtrict legal ſenſe, a debtor who has a repreſentative dies not; his exiſtence is continued in his heir, and the debtor is not changed. In this view the heir comes in effect to be the original debtor; and the creditors cannot reach the effects otherwiſe

than

than upon his failure of payment, more than if he were in reality, inſtead of fictitiouſly, the original debtor.

THE foregoing caſe of an heir's taking the benefit of ſucceſſion, is ſelected from many that belong to this ſubject, in order to be handled in the firſt place; for being of all the ſimpleſt, it furniſhes an opportunity to examine with the greater perſpicuity, what it was that moved our forefathers, to give up their accuſtomed form of execution for that preſently in uſe. This new form of execution againſt the heir when entered, was probably eſtabliſhed long before the ſixteenth century. We diſcover from our oldeſt law-books, and in particular from the Regiam Majeſtatem, that our forefathers began early to reliſh the maxims of the Roman law. And though in this book we diſcover no direct traces of the fiction that makes the heir and the anceſtor to be the ſame perſon, it is probable however, conſidering the ſwift progreſs

greſs of the Roman law in this country, that the fiction obtained a currency with us not long after the Regiam Majeſtatem. Hence it is likely, that the old form of appriſing the land for the predeceſſor's debt, without regarding the heir, muſt have been long in diſuſe, in the preſent caſe, where the property is by ſervice transferred to the heir; and who thereby is ſubjected perſonally to all the predeceſſor's debts. This caſe undoubtedly gave a commencement to the form preſently in uſe, which requires, that the eſtate be attached, not as belonging to the anceſtor the original debtor, but as belonging to the heir. In this view, a decree goes againſt the heir, making him liable for the debt; and thereafter adjudication paſſes againſt the eſtate, as his property and as for payment of his debt. But though the new form commenced ſo early, we have no reaſon to believe it was ſo early compleated. Where an heir lyes out unentered, and intermeddles not with the anceſtor's effects, he cannot, in

that

that ſituation, be held as *eadem perſona cum defuncto;* and an eſtate to which the heir lays no claim, is naturally conſidered as ſtill belonging to the anceſtor. For theſe reaſons, there was in this caſe nothing to obſtruct the anceſtor's creditors from attaching the eſtate by legal execution, more than if their debtor were ſtill alive. Accordingly, from the charter of appriſing above mentioned, granted to Richard Kine, we find, that where the heir did not enter, the old form of attaching land was in uſe ſo late as the 1508. Nor have we reaſon to ſuppoſe that this was the lateſt inſtance of the kind; for where the creditors of the anceſtor, are willing to confine their views to his eſtate without attacking the heir, there cannot be a more ready method for anſwering their purpoſe, than that of appriſing the land, which might be done with as little ceremony as when the debtor was alive. A decree, it is true, was neceſſary for this execution, as no execution can proceed without the authority of a judge: but

it was a matter of no difficulty to obtain a decree, if not already obtained againſt the debtor himſelf. The form is, to call the heir in a proceſs, not concluding againſt him perſonally, but only that the debt is true and juſt. The heir has no concern here, but merely to repreſent a defendant; and therefore a decree goes of courſe, declaring the debt to be juſt. This declaratory decree, commonly called a decreet of cognition, was held, and to this day is held, a ſufficient foundation for execution.

CONSIDERING that in the beginning of the ſixteenth century, creditors after their debtor's death had acceſs to attach his land, in the manner now mentioned, and conſidering that a general charge was in practice before this time, as will by and by be proved, it appears to me evident, that this writ was invented, for no other purpoſe but to reach the heir, and to ſubject him perſonally to the debts of his anceſtor; which may be gathered even from the writ itſelf.

itſelf. The heir was ſubjected if he entered; and this was a contrivance to reach him, if poſſible, where he was not entered. This writ, as will be ſhown by and by, produced the preſent form of execution for recovering payment after the debtor's death, and thereby occaſioned a conſiderable revolution in our law; which makes it of importance to trace its hiſtory with all poſſible accuracy.

To have a juſt notion of letters of general charge, we muſt view the condition of an heir-apparent with relation to the ſuperior. The heir-apparent has a year to deliberate, whether it will be his intereſt to enter to the land, and ſubject himſelf to all the duties incumbent on the vaſſal. And he may alſo continue to deliberate after the year runs out, until he be compelled in the following manner to declare his will. The ſuperior obtains a letter from the King, giving authority to charge or require the heir to enter within forty days, under the

penalty of forfeiting his right to the feudal ſubject. This furniſhed a hint to creditors who wanted to make the heir liable. A ſimilar form was invented, which had the ſanction of the ſovereign court without a ſtatute. A creditor obtains a letter from the King, giving authority to charge or require the heir to enter within forty days; and to certify him, that his diſobedience ſhall ſubject him perſonally to the creditor, in the ſame manner as if he were entered. This letter, commonly called Letters of General Charge, being ſerved on the heir, obliges him to come to a reſolution. If he obey the charge by entering, he is of courſe ſubjected to all his anceſtor's debts. If he remain in his former ſituation without entering, the charge is a medium upon which he may be decerned perſonally to make payment to the creditor in whoſe favour the letter is iſſued; and therefore to avoid being liable, he has no other method but to renounce the ſucceſſion, which is done by a formal writing under

his

his hand, put into the proceſs or into the record.

At what time the general charge was introduced, cannot with accuracy be determined. That it was known long before the ſtatute 1540, appears from a deciſion cited by Balfour, dated *anno* 1551 *, in which it is mentioned as a writ in common and general uſe; not at all as recent or newly invented. Its antiquity is further aſcertained by an argument, which, though negative, muſt have conſiderable weight. The court of ſeſſion, the ſame that is now in being, was eſtabliſhed *anno* 1532; and though the moſt ancient records of this court are not entire, we have however pretty great certainty of its regulations, ſuch of them at leaſt as are of importance; for theſe, where the records are loſt, may be gathered from our authors, and from other authentick evidence. But as there is not in any author, or in any writing,

* Tit. Heirs and Succeſſors, chap. 17.

the ſmalleſt hint that this writ was introduced by the court of ſeſſion; we have good reaſon to conclude, that it had a more early date.

THE better to underſtand what follows, we muſt take a deliberate view of this new writ. To ſupply defects in the common law, is undoubtedly the province of the ſovereign court, and is one of its moſt valuable prerogatives. But then, regulations of this ſort ought not only to be founded on neceſſity, but alſo on material juſtice. Unhappily, neither of theſe grounds can be urged, to juſtify letters of general charge. For firſt, this writ, when invented, was in no view neceſſary; the common law giving ready acceſs to a debtor's effects after his death for payment of his debts, as well as during his life; and beyond this a creditor can have no juſt claim. In the next place, this writ, with reſpect to the heir-apparent, is oppreſſive and unjuſt: for while the effects of the debtor ly open to execution,

what

what earthly concern has the creditor with an heir, who hath not claimed the ſucceſſion, nor intermedled with the effects? and why ſhould any attempt be indulged, to ſubject a man to the payment of debt not of his own contracting? This heteroclite writ, procured, in all appearance, by the undue influence of creditors, hath in its conſequences proved even to them an unhappy contrivance. It evidently produced our preſent form of obtaining payment after the debtor's death, which, as obſerved, being unjuſt as to the heir, has recoiled againſt the creditors, by involving them in an execution, intricate, tedious, and expenſive; oppoſite in every particular to the ſimple and beautiful form eſtabliſhed in the common law. I proceed to ſhow in what manner the general charge produced a revolution ſo important.

REFLECTING upon this ſubject, it will be found, that after the charge is given, and the forty days elapſed, the creditor charging

charging has it no longer in his power to retreat, or in quality of the anceſtor's creditor, to attach by real execution, the eſtate as belonging to the anceſtor. Such neceſſarily muſt be the effect of the change of circumſtances occaſioned by this charge. If the heir obey the charge by entering, he occupies the place of the anceſtor: he is, in a legal ſenſe, the anceſtor; and execution proceeds againſt him and his effects, preciſely as if he were really, and not by a fiction, the original debtor. This caſe therefore bars all acceſs to the original form of execution. The anceſtor is withdrawn as if he had never been; and upon that ſuppoſition the eſtate cannot be appriſed as his property. In the next place, if the heir remain in his former ſituation, without declaring his mind, he becomes perſonally liable, preciſely as if he had entered. This ſituation, equally with the former, and for the ſame reaſon, bars the creditor from having acceſs to the eſtate by the old form of execution. So ſoon as the debt is transferred

ferred againſt the heir, he ſo far becomes *eadem perſona cum defuncto*. With regard to this debt, he is conſidered to be the original debtor; and as the creditor no longer enjoys the character of the anceſtor's creditor, he cannot have acceſs to the eſtate as belonging to the anceſtor; neither can he have acceſs to it as creditor to the heir, who himſelf hath no right until he enter. Again, if the heir renounce, the eſtate returns to the ſuperior, who muſt have the land if he have not a vaſſal; and by this means alſo the creditor is excluded from all acceſs to the land; becauſe it is now no longer the property either of the anceſtor or of the heir. Theſe conſequences of a charge, where the heir enters not, appear to to be ſtrong obſtacles againſt the creditor wanting to attach the land. In what manner they were ſurmounted, I ſhall endeavour to ſhow.

I begin with the caſe where the heir-apparent, after he is charged, remains ſilent,

and

and neither enters nor renounces. The charge in this caſe, for the reaſon above mentioned, ſubjects him perſonally to the creditor at whoſe inſtance he is charged; and by the ſame means he may be ſubjected to all the creditors. So far good. The creditors upon this medium may proceed to perſonal execution. But as to real execution, the difficulty is great; for, as above obſerved, the debt by the charge being laid upon the heir, there cannot be acceſs to the land otherwiſe than as belonging to him. But then, how can land be adjudged from a debtor who is not veſted in the property? The reader will advert, that he is engaged in a period long before the ſtatute 1540, affording relief to the proper creditors of the heir by means of a ſpecial charge. Admitting only the heir to be juſtly ſubjected to his anceſtor's debts, which, with reſpect to what is now under conſideration, muſt be admitted, it becomes unqueſtionably his duty to enter to the land, in order to give the creditors acceſs to it

for

for their payment. And if he prove refractory, it becomes the duty of the ſovereign court to interpoſe and to perform for him by ſelling the land, or at leaſt by adjudging it to the creditors for their payment. The latter was accordingly done. But before attempting an extraordinary remedy, as good order requires, the debtor's obſtinacy to be firſt aſcertained; a ſecond letter in that view is obtained from the King, giving authority to charge or require the heir, to enter to the land within forty days; and to certify him, that, after the lapſe of this term, he ſhall be held, with reſpect to the creditors, as actually entered. This method ſolves all difficulties. The creditors proceed to appriſe the land from the heir, now their debtor, in the ſame manner as if he had a compleat title to the ſame by a ſolemn entry.

In the caſe of a renunciation, the obſtacle is much greater than in that laſt mentioned. A renunciation to be heir, ac-

cording to the nature of feudal property, is a total bar to the anceſtor's creditors, which could not have been ſurmounted, and ought not to have been ſurmounted, while the feudal law was in vigour. In the original feudal ſyſtem an heir hath no claim to the land which his anceſtor poſſeſſed, unleſs he undertake to ſerve the ſuperior in quality of a vaſſal; and therefore if he refuſe to ſubmit to this ſervice, the ſuperior enters to poſſeſs the land, which antecedently was his property. But a renunciation to be heir, though obtained at the ſuit of a creditor, being however an expreſs declaration by the heir, that he will not ſubmit to be vaſſal, muſt, in ſtrict law, have the effect to reſtore the land to the ſuperior, and to cut out all the creditors. This, as obſerved, would originally have been thought no hardſhip. But at the time we adopted the notions of the Roman law, the bulk of the land in Scotland had paſſed from hand to hand for a full price paid; and ſuch a purchaſe, contrary to the original

ginal conſtitution of the feudal law, transferred the property to the purchaſer, though, according to the form of our land-rights, he is obliged to aſſume the character of a vaſſal. And therefore, whatever effect a renunciation might have while a vaſſal's right was merely uſufructuary, it was rightly judged, that it ought not to have the ſame effect where the vaſſal, in reality, is proprietor. Equity pleaded ſtrongly for the creditors, that the ſuperior, *certans de lucro captando*, ought not to be preferred to them, *certantes de damno evitando*. Theſe conſiderations moved the ſovereign court, to think of ſome remedy for relieving the creditors. It would have been too bold an attack upon eſtabliſhed law, to declare, that, in this caſe, a renunciation ſhould not operate in favour of the ſuperior, but only of the creditors. The court took ſofter meaſures. The law was permitted to have its courſe, in reſtoring the land to the ſuperior. But action was ſuſtained to the creditors againſt the ſuperior, to infeft them in the land for

ſecurity and payment of their debts; and the decree given in this proceſs obtained the name of an adjudication upon a renunciation to be heir, or an adjudication *cognitionis cauſa;* which being afterwards modelled into a different form, paſſes now commonly under the name of an adjudication *contra hereditatem jacentem.* Here was invented a new ſort of execution againſt land, ſimilar in its form to no other ſort in practice. And it may be thought ſtrange, why the court, in imitation of the eſtabliſhed form of appriſing, did not rather direct the land to be ſold for payment of the creditors. In matters of ſo great antiquity, where hiſtory affords ſcarce any light, it is difficult to give ſatisfaction upon every point. I can form no conjecture more probable, than that, in contriving a remedy againſt the hardſhips of the common law, the court thought they had no ſufficient authority to award a compleat execution, ſuch as was given by the common law; and that it was venturing far enough to afford the creditors

creditors a ſecurity, upon land which once indeed belonged to their debtor, but was now legally transferred to the ſuperior with whom they had no connection.

With reſpect to other heretable ſubjects, allodial in their nature as not held of any ſuperior, heirſhip moveables, for example, bonds ſecluding executors, and diſpoſitions of land without infeftment, the heirs renunciation created no difficulty. Subjects of this kind are by the renunciation left *in media* without an owner; and it is an obvious as well as a natural ſtep, to adjudge them to a creditor for his payment. By ſuch adjudication the court doth nothing but what the debtor himſelf ought to have done when alive; and which it is preſumed he would have done, had he not been prevented by death. This particular adjudication, it is probable, was the firſt that came into uſe, and paved the way to an adjudication of land, when it returned to the ſuperior by the heir's renunciation.

If the general charge be of an ancient date, we cannot have much difficulty about the æra of the ſpecial charge. For as the general charge is a very imperfect remedy without the ſpecial charge, the invention of the latter could not be at any diſtance of time from the eſtabliſhment of the former. And a fact is mentioned above, which puts this matter beyond conjecture. Before the ſtatute 1540, we find relief by a ſpecial charge afforded even to the proper creditors of the apparent heir; which proves to conviction, that the ſame relief muſt have been afforded long before to the creditors of the anceſtor, after the heir is made liable by a general charge. For, as above obſerved, it is not ſuppoſable, that a remedy, afforded to the proper creditors of the heir-apparent, would be denied to the creditors of the deceaſed proprietor, who are more connected with the eſtate. According to the natural courſe of human improvements, the creditors of the deceaſed proprietor, muſt have been long privileged with a ſpecial

cial as well as with a general charge, before it would be thought proper to extend the privilege of a ſpecial charge to the creditors of his heir-apparent.

IT appears from Craig *, that an adjudication *cognitionis cauſa* is the remedy which of all came lateſt. We have this author's expreſs authority for ſaying, that in his time it was a recent invention. Nor is this at all wonderful. For a renunciation to be heir, muſt, to the anceſtor's creditors, be a puzzling circumſtance, when its legal effect is to reſtore the land to the ſuperior, who is liable for none of the vaſſal's debts.

TAKING under review the foregoing innovations, to which we were inſenſibly led by the prevailing influence of the Roman law, it is probable, that the fiction of identity of perſon was firſt applied by our lawyers to the caſe where an heir regularly enters

* L. 3. Dieg. 2. § 23.

enters to the eſtate of his anceſtor. Being in this caſe beneficial to creditors, who have the heir bound as well as the eſtate, it gained credit, and obtained a currency. Nor was it attended with any inconvenience, to creditors at leaſt, while they had acceſs to appriſe, as formerly, the eſtate of their debtor, where the heir abſtained from entering. This, one ſhould think, was affording to creditors every privilege they could juſtly demand for obtaining payment. But this did not ſatisfy them. To have the heir bound perſonally, in place of his anceſtor, was an enticing proſpect; and the general charge was invented, in order to make him liable before his entry, and where he has not taken the benefit of the ſucceſſion. This legal ſtep, it muſt be acknowledged, is pretty well contrived to anſwer its purpoſe. The heir, urged by a general charge, hath no way to evade the certification of being perſonally liable, other than the hard alternative of renouncing altogether the ſucceſſion. This new form,

for

for that reaſon was much reliſhed. Creditors did not chuſe to confine themſelves to the eſtate of the anceſtor their debtor, while any hope remained of ſubjecting the heir perſonally, by means of a general charge. And accordingly for a century and a half, or perhaps more, it has been the conſtant method to ſet out with a general charge, where the heir is not entered. If this method to ſubject the heir perſonally prove ſucceſsful, the creditors, as made out above, muſt bid adieu to the eſtate conſidered as *in hereditate jacente* of their original debtor. Having choſen the heir for their debtor, they cannot now attach the eſtate otherwiſe than in quality of his creditors. Thus it has happened, that during ſo long time as that now mentioned, there is no inſtance of following out the old form by appriſing or adjudging the land after the debtor's death, without regarding the heir. Whether it may be thought too late now to return to this old form, governed by the principles of

juſtice as well as of expediency, I take not upon me to determine.

THE difference betwixt the law of Scotland and of England as to the preſent ſubject, will be clearly apprehended, by ſetting the matter in the following light. A pure donation, which doth not ſubject the donee to any obligation, transfers property without the neceſſity of acceptance; and upon that account, infants and abſents are benefited by ſuch deeds, without knowing any thing of the matter. But a deed laying the donee under any burden, beſtows no right without actual acceptance: if it did, any man might be ſubjected to the ſevereſt burdens without his conſent. Thus, in England, the rule obtains, *Quod mortuus ſaſit vivum;* becauſe an heir, though veſted in his anceſtor's heritage, is not ſubjected perſonally to his anceſtor's debts. In Scotland again, the effects of the anceſtor are not tranſmitted to the heir, but by means of ſome voluntary act, which imports the

conſent of the heir to ſubject himſelf to his anceſtor's debts. For, by our law, a ſtrict connection is formed, betwixt the right that the heir has to the anceſtor's eſtate, and the obligation he is under to pay the anceſtor's debts, ſo far at leaſt as that the latter is a neceſſary conſequence of the former. It may indeed happen, that the heir is made liable to pay the anceſtor's debts, without being veſted in the eſtate; but this is to be conſidered as a penalty for refuſing to enter heir when he is charged, or for intermeddling irregularly with the anceſtor's effects, which are ſingular caſes.

THE matter of the foregoing hiſtory is ſo ſingular, as not perhaps to have a parallel in the law of any country. Here, from the dead law of an ancient people, we find a metaphyſical fiction adopted, without any foundation in the common rules of juſtice, and repugnant in a peculiar manner to the common law of this iſland; and yet ſo fervently imbraced, as

to have made havock of every part of our law that ſtood in oppoſition. I have pointed out ſome of the many inconveniencies that its reception produced, with regard to creditors, and conſequently to credit. I have ſhown what ſubterfuges and fictitious contrivances were neceſſary, in order to give it a currency. I have ſhown how tedious, how intricate, and how expenſive a form it hath occaſioned, for recovering payment of debt: but I have not yet ſhown it in its worſt light. The evils I have mentioned, are mere triffles compared with thoſe that follow. No perſon who hath given any attention to the hiſtory of our law, can be ignorant of the numberleſs artifices invented by heirs in poſſeſſion of the family-eſtates, to ſcreen themſelves from paying the family-debts. The numberleſs regulations made in vain, age after age, to prevent ſuch artifices, will ſatisfy every one, that there muſt be an error in the firſt concoction, by which a remedy is rendered extremely difficult.

How

How comes it that we never hear of ſuch frauds in England? The reaſon is obvious. The juſt and natural rule of a *ſeparatio bonorum*, which obtains there, makes it impracticable for the heir to defraud his anceſtor's creditors. They have no concern with the heir, but take themſelves to the anceſtor's eſtate for their payment. In Scotland, the anceſtor's eſtate cannot be reached, even by his own creditors, otherwiſe than by attacking the heir, unleſs he be pleaſed to abandon it to the creditors. But this ſeldom was the caſe of old. The heir had a more profitable game to play, even where the eſtate was overburdened with debts. His method generally was to renounce to be heir, in order to evade a perſonal decerniture: but he did not however abandon the eſtate. It was ſeldom difficult to procure ſome artificial or fictitious title to the eſtate, under cover of which poſſeſſion was apprehended; and this was a great point gained. If ſuch title, after a dependance perhaps for years, was found

found inſufficient to bar the creditors, another title of the ſame kind was provided; and ſo on without end. It is true, the heir's renunciation entitles the creditors to attach the eſtate by adjudications *cognitionis cauſa:* but then the heir, as has been obſerved, was always provided with ſome collateral title, not only to colour his poſſeſſion, but alſo to compete with the creditors. In the mean time, the rents were a fund in his hands to take off any of the preferable creditors that were like to prove too hard for him. And ſuch purchaſe was a new protection to the unconſcientious heir, againſt the other creditors. In fact, the moſt conſiderable eſtates in Scotland, are poſſeſt at this day by ſuch diſhoneſt titles; the legiſlature, however willing, never having been able to invent any compleat remedy to prevent ſuch pernicious frauds. The foregoing obſervations will enable us to trace theſe artifices to their true ſource. They muſt be aſcribed to the fiction of identity of perſon; becauſe by means

means of this fiction chiefly, opportunity was furniſhed for committing theſe frauds. Had this matter been ſeen by our legiſlature in its proper light, a very ſimple and very effectual remedy muſt have occurred to them. If the heir refuſed to ſubject himſelf to the debts of his anceſtor, nothing elſe was neceſſary, but to reſtore the ancient law, authoriſing the anceſtor's heritage to be ſold for payment of his debts. But this regulation had been long in diſuſe, and we were not leſs ignorant of it, than if it never had exiſted.

And, as an evidence of the weakneſs of human foreſight, I muſt obſerve, that a ſtatute made without any view to the frauds of heirs, proved more ſucceſsful againſt theſe frauds, than all the regulations purpoſely made; and that is the ſtatute for ſelling the eſtates of bankrupts. An heir has now very little opportunity to play the accuſtomed game, when it is in the power of creditors to wreſt the eſtate out of his hands, by a pub-

lick

lick auction. And the experience now of fifty years, has vouched this to be a compleat remedy. For we hear not at preſent of any frauds of this kind, nor are we under any apprehenſion of them. So far from it, that we are receding more and more, every day, from the rigid principle of an univerſal repreſentation, and approaching to the maxim of equity, which ſubjects not the heir beyond the value of the ſucceſſion. For what other reaſon is it, that the act 1695, introducing ſome new rigid paſſive titles, is totally neglected, though it is undoubtedly an additional ſafe-guard to creditors againſt the frauds of heirs? We are not now afraid of theſe frauds: they are prevented by the equitable remedy of ſelling the anceſtor's eſtate; and judges, if they have humanity, will be loath to apply a ſevere remedy, when a mild one is at hand, which is alſo more effectual. It is remarkable, that though the act for ſelling the eſtates of bankrupts proved an effectual remedy, yet this virtue

in

in the ſtatute was not an early diſcovery. It was not diſcovered at the time of the act 1695, and if any perſon, of more than ordinary penetration, had been looking on when that ſtatute was made, it muſt have provoked a ſmile, to find our legiſlature, with their eyes open, contriving an imperfect remedy, when they had already, with their eyes ſhut, ſtumbled on one that was perfect.

TRACT XIII.

HISTORY

OF

The LIMITED and UNIVERSAL Repreſentation of Heirs.

BY the law of nature, an heir, beyond what he takes by the ſucceſſion, is not ſubjected to the debts of his anceſtor. In the Roman law a ſingular notion was adopted, that the heir is the ſame perſon with the anceſtor. Hence an heir, in the Roman law, ſucceeds to all the effects of the anceſtor, and is ſubjected to all his debts. This was carried ſo far with regard

to children, that they were heirs *ex neceſſitate juris;* and upon that account were diſtinguiſhed by the name of *ſui et neceſſarii heredes.* Natural principles afterwards prevailed, and children, in common with other heirs, were privileged to abſtain from the ſucceſſion. This was done by a *ſeparatio bonorum*, and by abandoning the goods of the anceſtor to his creditors. But ſtill if the heir took poſſeſſion of the anceſtor's effects, or in any manner behaved as heir, he, from that moment, was underſtood to be *eadem perſona cum defuncto*, and conſequently was ſubjected univerſally to all the anceſtor's debts. At laſt the benefit of inventory was afforded, which protected the heir from being liable farther than *in valorem.* This privilege, tempered the ſeverity of the foregoing artificial principle, and, in a manner, reſtored the law of nature, which had been overlooked for many ages.

In England, the artificial principle of identity of perſon never took place. An heir,

heir, by the Engliſh law, is not bound to pay his anceſtor's debts, even when he takes by ſucceſſion. The creditors have the privilege of attaching their debtor's effects poſſeſſed by the heir, in the ſame manner as when theſe effects were in the debtor's own poſſeſſion, during his life. The heir is perſonally liable to the extent only of what he intermeddles with. The Engliſh law indeed deviates from natural juſtice, in making a diſtinction betwixt the heritable and moveable debts, ſubjecting the heir to the former only, and the executor to the latter. This is evidently unjuſt as to creditors; for they may be forfeited by their debtor's death, though he die in opulent circumſtances, which as to perſonal creditors muſt always happen, when his moveable funds are narrow and his moveable debts extenſive. Such a regulation is the leſs to be juſtified, that it furniſheth an opportunity for fraud. For what if a man, with a view to diſappoint his perſonal creditors after his death, ſhall lay out all his money upon land?

I know

I know of no remedy to this evil, unleſs the court of chancery, moved by a principle of equity, venture to interpoſe.

By the feudal law, when in purity, there could not be ſuch a thing as repreſentation; becauſe the heir took the land, not as coming in place of his anceſtor, but by a new grant from the ſuperior. But when land was reſtored to commerce, and was purchaſed for a full price, it was juſtly reckoned the property of the purchaſer, though held in the feudal form. Land by this means is ſubjected to the payment of debt, even after it deſcends to the heir. And in Scotland, probably, the privilege at firſt was carried no farther than in England, to permit creditors, after the death of their debtor, to attach his funds in poſſeſſion of the heir.

But as Scotland always has been addicted to innovations, the Roman law prevailed here, contrary to the genius of our own law; and the fiction was adopted of the heir

heir and anceſtor being the ſame perſon. This fiction crept firſt into the reaſonings of our lawyers, figuratively, in order to explain certain effects in our own law; and gained by degrees ſuch an aſcendant, as, in our apprehenſion, to form the very character of an heir. Yet, conſidering the heirs of different kinds that are acknowledged with us, an heir of line, an heir-male, an heir of proviſion, &c. one ſhould not imagine that our law lay open to have this fiction grafted upon it. In the Roman law there was but one heir who ſucceeded *in univerſum jus defuncti*, and who, by a very natural figure, might be ſtiled *eadem perſona cum defuncto*. But can we apply this figure, with any propriety, to an heir who ſucceeds not *in univerſum jus*, but is limited to a particular ſubject? This opens a ſcene which I ſhall endeavour to ſet in a juſt light, by examining how far the figure has been carried with us, and what bounds ought to be ſet to it.

OUR law in all probability was once the ſame with that of England, *viz.* that the heir who ſucceeds to the real eſtate, is liable to real debts only; the moveable debts being laid upon the executor. But this did not long continue to be our law. It muſt ſometimes have happened, notwithſtanding the frugality of ancient times, that the perſonal eſtate was not ſufficient for ſatisfying the perſonal debts. It was in this caſe juſtly thought hard, that the heir ſhould enjoy the family-eſtate, while the perſonal creditors of his father, or other anceſtor, were left without remedy. Equity dictates, that after the moveables are exhauſted, the perſonal creditors ſhall have acceſs to the land for what remains due to them. This practice is with us of an early date. We find it eſtabliſhed in the reign of David II. as appears from the Regiam Majeſtatem *. And it was improved to the benefit of creditors by ſtatute †, enacting, "That if the perſonal creditors are "not

* Lib. 2. cap. 39. § 3. † Act 76. p. 1503.

" not paid out of the moveables within " the year, they ſhall, without further de- " lay, have acceſs to the heir." Upon the ſame foundation, and by analogy of the ſtatute, the executor is made liable for the heretable debts. This came in late; for Sir Thomas Hope * obſerves, " That " the Lords of old were not in uſe to ſu- " ſtain proceſs againſt the executor for " payment of an heretable debt." And he is ſo little touched with the equity of the innovation, as to cenſure and condemn it; for a very inſufficient reaſon indeed; " be- " cauſe (ſays he) there is no law to give " the executor relief againſt the heir, as " the heir has againſt the executor when " he pays a moveable debt;" as if this relief did not follow from the nature of the thing. Reviewing this hiſtorical deduction, I cannot perceive in it the ſlighteſt ſymptom of identity of perſon. This fiction admits not of a diſtinction betwixt heretable and moveable ſubjects. Identity of

* Minor Practicks, § 104.

perſon beſtows neceſſarily upon the heir every ſubject that belonged to the anceſtor. Neither admits it of any diſtinction among debts; for if the deceaſed was liable to all debts without diſtinction, ſo muſt the heir. In place of which we find the heir of line ſubjected, by the common law, to heretable debts only; and not to moveable debts, otherwiſe than upon a principle of equity, which, if the moveables be not ſufficient, ſubjects the land-eſtate, rather than that the creditors ſhould ſuffer.

It is then evident, that in our practice there is no place for this fiction, even with regard to the heir of line; and that this heir is ſubjected univerſally to his anceſtor's debts, without any foundation in the common law; and even without any foundation in the fiction itſelf. For as an heir of line is clearly not *eadem perſona cum defuncto*, except as to the heretable eſtate, it is equally clear, that, by authority of this fiction, he ought not to be ſubjected univerſally

verſally to any debts but what are heretable. As to moveable debts, equity dictates that creditors be preferred to every repreſentative of their deceaſed debtor; and therefore that the land-eſtate ſhould be ſubjected to the perſonal creditors, when the moveables are not ſufficient. But this maxim of equity can never be extended farther againſt the heir, than to make him liable for moveable debts, ſo far as he is benefited by the ſucceſſion; becauſe equity, which relieves from oppreſſion, can never be made the inſtrument of oppreſſion.

In the next place, as to a limited heir, ſucceeding to one ſubject only, why ought he to be liable univerſally to the anceſtor's debts? If he repreſent the anceſtor, it is not univerſally, but only as heir in a particular ſubject. And therefore, according to the nature of his repreſentation, he ought to be liable for debts only which affect that ſubject, or for debts of the ſame kind with the ſubject, or at fartheſt for debts of

every kind to the extent of the ſubject. I know not that it has been held by any able writer, far leſs decided, that an heir provided to a particular ſubject is liable univerſally to the anceſtor's debts. Dirleton gives his opinion to the contrary in a moſt ſatisfying manner*. His words are: "Heirs "of proviſion and tailzie who are to ſuc- "ceed only *in rem ſingularem* albeit *titulo* "*univerſali*; *Quæritur* if they will be liable "to the defuncts whole debts, though far "exceeding the value of the ſucceſſion; "or if they ſhould be conſidered as *here-* "*des cum beneficio inventarii*, and ſhould "be liable only *ſecundum vires*, there being "no neceſſity of an inventory, the ſubject "of their ſucceſſion being only, as ſaid is, "*res ſingularis?* Anſwer. It is thought that "if one be ſerved general heir-male with- "out relation to a ſingular ſubject (as to "certain lands) he would be liable *in ſoli-* "*dum*; but if he be ſerved only ſpecial "heir in certain lands, he ſhould be liable "only *ſecundum vires*."

THE

* Doubts. Tit. (Heirs of Tailzie)

THE heir of line, or heir general, is then the only perſon to whom the character of identity of perſon can with any ſhadow of propriety be applied. Nor to him can it be applied in the unlimited ſenſe of the Roman law; but only as to the heretable eſtate and heretable debts. To all that is carried by a general ſervice he has right, without limitation; and it is plauſible if not ſolid, that he ought to be liable without limitation, to all heretable debts, ſuch as come under a general ſervice. We follow the ſame rule betwixt huſband and wife, when we ſubject him to her moveable debts in general, and give him right to all her moveable effects in general. And this at the ſame time appears to be the true foundation of the privilege of diſcuſſion, competent to heirs whoſe right of ſucceſſion is limited to particular ſubjects. The general heir, or heir of line, who is not thus limited, but ſucceeds in general to all ſubjects of a certain ſpecies, is the only heir to whom the identity of perſon

can

can with any colour be applied; and conſequently is the only heir who ought to bear the burden of the debts.

It may be thought more difficult to explain, why an heir of line, making up titles by a ſervice to a land-eſtate which was the property of his anceſtor, ſhould be ſubjected univerſally to his anceſtor's debts; when this very title, *viz.* his retour and ſeiſin, contains an inventory *in gremio;* not being in its nature a general title, but only a title to one particular ſubject.

To explain this matter diſtinctly, it will be neceſſary to carry our view pretty far back in the hiſtory of our law. Among all nations it is held as a principle, that property is transferred from the dead to the living, without any ſolemnity. Children, and other heirs, are entitled to continue the poſſeſſion of their anceſtor; and where the heir is not bound for his anceſtor's debts, ſuch poſſeſſion is underſtood to be

continued by will alone, without any ouvert act. In Scotland, the heir originally was not liable for the debts of his anceſtor, nor at preſent is he liable in England. Hence it is, that as to rent-charges, bonds ſecluding executors, and other heretable ſubjects, which may be termed allodial, becauſe not held of any ſuperior, theſe were transferred to the heir of blood directly upon his ſurvivance; and, with regard to theſe, the ſame rule obtained here, that obtains univerſally in England and France, *Quod mortuus ſaſit vivum.* Land and other ſubjects held of a ſuperior, are with us in a very different condition. The vaſſal, by the principles of the feudal law, is not proprietor; and, ſtrictly ſpeaking, tranſmits no right to his heir. The ſubject muſt be claimed from the ſuperior; and the heir's title is a new grant from him. Thus then ſtood originally the law of Scotland. Heretable ſubjects veſted in the heir merely by ſurvivance. The ſingle exception was a feudal holding, which required, and ſtill

requires

requires a new grant from the ſuperior. If the heir of line had this new grant, he needed no other title to claim any heretable ſubject which belonged to his anceſtor. But heirs were put in a very different ſituation, by the fiction of identity of perſon adopted from the Roman law. The heir by claiming the ſucceſſion, being ſubjected perſonally to his anceſtor's debts, muſt have an election to claim or to abandon as it ſuits his intereſt. This of neceſſity introduced an *aditio hereditatis*, as among the Romans, without which the heir can have no title to the effects of his anceſtor. If he uſe this form, he becomes *eadem perſona cum defuncto* with regard to benefits as well as burdens. If he abſtain from uſing it, he is underſtood to abandon the ſucceſſion, and to have no concern either with benefits or burdens. The only point to be conſidered was, what ſhould be the form of the *Aditio*. By this time the property being transferred from the ſuperior to his vaſſal, it was juſtly thought, that the vaſſal's

vaſſal's heir who enjoyed the land-eſtate of his anceſtor, could not evade payment of his debts. For this reaſon, an infeftment being the form eſtabliſhed for tranſmitting the property to the heir, the ſame form was now held as a proper *aditio hereditatis* to have the double effect, not only of veſting the heir with the property as formerly, but alſo of ſubjecting him to the anceſtor's debts. This title, it is true, being in its nature limited, ought not to ſubject him beyond the value of the ſubject. But then the identity of the anceſtor and his heir being once eſtabliſhed, it was thought, as in the Roman law, to have an univerſal effect, and to be an active title to every ſubject that could deſcend to the heir of line. And our former practice tended mainly to ſupport this inference; for it was ſtill remembered, that formerly all allodial heretable ſubjects were veſted in the heir of line, upon his ſurvivance merely. The infeftment being thus held an *aditio hereditatis*, not only with reſpect to the land-eſtate, but

with reſpect to all other heretable ſubjects, it followed of courſe, that the infeftment behoved alſo to be an univerſal paſſive title; for if the heir ſucceeded to all heretable ſubjects without limitation, it ſeemed not unreaſonable that he ſhould be ſubjected to all debts without limitation. Theſe concluſions, it muſt be owned, were far from being juſt or accurate. It appears extremely plain, that if a man die poſſeſt of a ſubject held of a ſuperior, and of other heretable ſubjects that are allodial, the heir ought to be privileged to make a title to one or other at his pleaſure, and to be ſubjected accordingly to the debts; that if he uſe a general ſervice, he muſt lay his account to be liable univerſally, but that if he confine himſelf to a ſpecial ſervice, he is not to be liable beyond the value of the ſubject. But our ancient lawyers were not ſo clear ſighted. They blindly followed the Roman law, by attributing to the identity of perſon the moſt extenſive effects poſſible. An infeftment in the land-eſtate

eſtabliſhed this identity, which, it was thought, did on the one hand entitle the heir of line to all the heretable ſubjects, and on the other did ſubject him to all the debts. And this affords a clear ſolution of the difficulty above mentioned. If the identity of perſon take at all place, it applies to none more properly than to an heir of blood, who enters by infeftment; eſpecially as he generally is of the ſame name and family with his anceſtor, lives in the ſame houſe, poſſeſſes the ſame eſtate, and carries on the line of the ſame family.

But now ſuppoſing the foregoing deduction to be juſt, is there not great reaſon to alter our preſent practice, and to hold a ſpecial ſervice to be, as it truly is in its nature and form, a limited title? Let us ſuppoſe that the heir of line, unwilling to repreſent his anceſtor univerſally, chuſes to abandon all the heretable ſubjects, except a ſmall land-eſtate, to which he makes up titles by a ſpecial ſervice; why ſhould

he be liable univerſally in this caſe? The natural conſtruction of ſuch a ſervice is, that the heir intends to confine himſelf to the ſubject therein mentioned, and to abandon the anceſtor's other eſtate, ſince he forbears to take out a general ſervice. Such conſtruction will better the condition of heirs, by removing ſome part of the riſk they run, and will not hurt creditors ſo far as their claim is founded on natural equity, *viz.* to have their debtor's effects applied for payment of his debts.

And I muſt obſerve with ſome ſatisfaction, that we have given this very conſtruction to an infeftment upon a precept of *Clare Conſtat;* it being an eſtabliſhed rule, that ſuch infeftment is not a title to any other ſubject but that contained in the precept. And for this very reaſon, neither doth it make the heir liable for the debts of his anceſtor farther than *in valorem.* Lord Stair*, it is true, conſiders a precept of

* Inſtit. page 467. at the foot.

of *Clare* as an univerſal paſſive title. But the court of ſeſſion entertained a juſter notion of this matter. A remarkable caſe is obſerved by Lord Harcus *, to the following purpoſe. "A man infeft upon a "precept of *Clare Conſtat* as heir to his fa- "ther, being purſued for payment of a debt "that was due by his father; pleaded an "abſolvitor upon the following medium, "that he had no benefit by the ſucceſſion, "the ſubject to which he had connected "by a precept of *Clare* being evicted from "him." It was anſwered, "That his en- "tering heir by the precept of *Clare Con- "ſtat*, made him *eadem perſona cum de- "functo;* that it was a behaviour as heir, "which ſubjected him to all his prede- "ceſſor's debts, without regard to the "eſtate, whether it was ſwallowed up by "an earthquake, or evicted by a proceſs." The Lords "judged the defender not liable "as heir, in reſpect the land was evicted "from him." It was ſaid, that had there been

* Tit. (Heirs) March 1683, Farmer *contra* Elder.

been a general ſervice, or a ſpecial ſervice which includes a general, the matter would have been more doubtful; eſpecially if there were other ſubjects to which a general ſervice gives right. The plain inference from this judgment is, that if eviction of the land-eſtate relieve the heir from being liable to pay the family-debts, the eſtate muſt be the meaſure of his repreſentation, and conſequently that he is not liable beyond the value.

THIS ſubject will perhaps be thought unneceſſary, now that the benefit of inventory is introduced into our law. It is indeed leſs neceſſary than formerly, but not however altogether uſeleſs. In many inſtances heirs neglect to lay hold of this benefit; and frequently the forms required by the ſtatute are unſkilfully or careleſsly proſecuted, ſo as to leave the heir open to the rigour of law, in all which caſes it comes to be an important enquiry, how far an heir is liable for the

debts of his anceſtor. I cannot at the ſame time help remarking, that it ſhows no true taſte for ſcience, to relinquiſh a ſubject, however beautiful, merely becauſe it appears not to be immediately uſeful. The hiſtory of law, which unfolds a ſubject in its natural as well as political progreſs, can never be uſeleſs. And, taking it upon the loweſt footing, it enables us to compare our preſent with our former practice, which always tends to inſtruction.

TRACT XIV.

OLD and NEW EXTENT.

THE extents old and new make a part of our law, which is involved in the dark clouds of antiquity. Theſe extents are not mentioned by our firſt writers, and later writers ſatisfy themſelves with looſe conjectures, which are the product of fancy without evidence. The deſign of the preſent eſſay is to draw this ſubject from its obſcurity, into ſome degree of light. It is a matter of curioſity, and poſſibly may be not altogether unprofitable, with relation eſpecially to our retours, of which theſe extents make an eſſential part.

As the Engliſh brieve of *diem clauſit extremum* approaches the neareſt of any to

our brieve of inqueſt, it may be of uſe to examine the Engliſh brieve, and the *valent* clauſe therein contained. Fitz-herbert, in his new nature of brieves *, explains this brieve in the following words. "The writ "of *Diem clauſit extremum* properly lieth, "where the King's tenant, who holdeth "of him *in capite*, as of his crown, by "knights ſervice, or in ſoccage, dieth "ſeiſed, his heir within age, or of full age, "then that writ ought to iſſue forth, and "the ſame ought to be at the ſuit of the "heir, &c. for upon that, when the heir "cometh of full age, he ought to ſue for "livery of his lands out of the King's "hands." And the writ is ſuch. "Rex "dilect. ſibi W. de K. eſcheatori ſuo in "Com. Deven. Salut. Quia W. de S. qui "de nobis tenuit in capite, diem clauſit "extremum, ut accipimus; tibi præcipi- "mus, quod omnia terras et tenementa "de quibus idem W. fuit ſeiſitus in do- "minico ſuo ut de feodo in Balliva tua "die quo obiit ſine dilatione cap. in ma-

num

* Page 558.

" num noſtram, et ea ſalvo cuſtodiri fac,
" donec aliud inde præceperimus, et per
" ſacramentum proborum et legal. homi-
" num de Balliva tua, per quos rei veritas
" melius ſcire poterit; diligent. inquiras,
" quantum terræ et tenementorum idem
" W. tenuit de nobis in capite, tam in
" dominico quam in ſervitiis, in Balliva
" tua die quo obiit, et quantum de aliis,
" et per quod ſervic. et quant. terræ et
" tenementa illa *valent* per annum in om-
" nibus exitibus; et quo die idem W. obiit,
" et quis propinquior ejus heres ſit: et cu-
" jus ætatis, et inquiſic. inde diſtincte et
" aperte fact. nobis in cancell. noſtra ſub
" ſigillo tuo, et ſigillis eorum per quos
" fact. fuerit, ſine dilatione mittas, et hoc
" Breve. Teſte, &c."

At what time the queſtion about the yearly rent of the land was ingroſſed in this brieve, is uncertain; probably after the days of William the Conqueror: for as all the lands in England were accurately valued in

that King's reign, and the whole valuations collected into a record, commonly called Domes-day book, this authentick evidence, of the rent of every barony, was a rule for levying the King's caſualties as ſuperior, without neceſſity of demanding other evidence. But domes-day book could not long anſwer this purpoſe; for when great baronies were diſmembered, each part to be held of the crown, this book afforded no rule for the extent of the caſualties to to be levied out of the lands of the new vaſſals. An inquiſition therefore was neceſſary, to aſcertain the yearly rents of the disjoined parcels; and there could not be a more proper time for ſuch enquiry than when the heir of a crown vaſſal was ſuing out his livery. This ſeems to be a reaſonable motive for ingroſſing the foregoing queſtion in the brieve. And in England, this enquiry was neceſſary upon a ſpecial account. It was not the cuſtom there to give gifts of the caſualties of ſuperiority. Officers were appointed in every ſhire to take poſſeſſion

in

in name of the King of the lands of his deceaſed vaſſals, and to keep poſſeſſion till the heirs were entered. Theſe officers, called eſcheators, were accountable to the crown for the rents and iſſues, and for the other caſualties; and the rent of the land aſcertained by the retour was the rule to the treaſurer for counting with eſcheators.

WE find not different values or extents in the Engliſh brieve, like what we find in the Scotch brieve. I ſhall endeavour to trace the occaſion of the difference, after premiſing a ſhort hiſtory of our taxes; carrying the matter as far back as we have evidence.

TAXES were no part of the conſtitution of any feudal government. The King was ſupported by the rents of his property-lands, and by the occaſional profits of ſuperiority, paſſing under the name of caſualties. Theſe caſualties, ſuch as ward, nonentry, marriage, eſcheat, &c. aroſe from the very nature

ture of the holding; and beyond theſe the vaſſal was not liable to be taxed; ſome ſingular caſes excepted eſtabliſhed by cuſtom, ſuch as, for redeeming the King from captivity, for a portion to his eldeſt daughter, and a ſum to defray the expence of making his eldeſt ſon a knight. For this reaſon, it is natural to conjecture, that the firſt univerſal tax was impoſed upon ſome ſuch ſingular occaſion. The firſt event we can diſcover in the hiſtory of Scotland to make ſuch a tax neceſſary, happened in the reign of William the Lyon. This King was taken priſoner by the Engliſh at Alnwick, 12th July 1174; and in December that year, he obtained his liberty from Henry II. upon a treaty, by which he and his nobles ſubjected this Kingdom to the crown of England *. Hector Boece, our fabulous hiſtorian, ſays, That upon this occaſion, William paid to Henry a hundred thouſand merks. But this ſeems to be aſſerted without any authority. The dependency

* Rymer, vol. I. page 39.

dency of Scotland on the crown of England, was a price ſufficient for William's liberty, without the addition of a ſum of money; and the ſilence of all other hiſtorians as to this fact, joined with the great improbability that a ſum ſo immenſe could be paid, leave this author without excuſe.

RICHARD I. who ſucceeded Henry, bent upon a voyage to the holy land, ſtood in need of great ſums for the expedition. William laid hold of this favourable conjuncture, met Richard at York, and, upon paying down ten thouſand merks Sterling, obtained from him a diſcharge of the treaty made with his father Henry; which was done by a ſolemn deed, dated the 25th December 1190, ſtill extant *.

THE ſum paid to King Richard upon this occaſion was too great to be raiſed by the King of Scotland out of his own domains. It muſt have been levied by a tax

* Rymer, vol. I. page 64.

tax or contribution; and there was good reaſon for the demand, as the money was to be applied for reſtoring the kingdom to its former independency. But of this fact we have better evidence than conjecture. The monks of the Ciſtertian order having contributed a ſhare, obtained from King William a deed, declaring, That this contribution ſhould not be made a precedent in time coming *. "Ne quod in tali "eventu ſemel factum eſt, qui nec prius "evenit, nec in poſterum Deo miſerante "futurus eſt, ullo modo in conſuetu- "dinem vel ſervitutem convertatur; ut "videlicit per quod ipſi, pro redimenda "regni libertate gratis fecerunt, ſervitus "iis imponatur." This, in all probability was the firſt tax of any importance that was levied in Scotland; and though our hiſtorians are altogether ſilent as to the manner, the deed now mentioned proves it to have been levied by voluntary contribution,

* Appendix to Anderſon's eſſay on the independency of Scotland, N°. 21.

tribution, and not by authority of parliament, which in thoſe days probably had not aſſumed the power of impoſing taxes.

THE next tax we meet with, is in the days of Alexander II. ſon to the above mentioned William. This King made a journey the length of Dover, and his ready money being exhauſted, he procured a ſum by pledging ſome lands, to redeem which he levied a tax. This appears from a deed, *anno regni* 15°. in which he declares, that the monaſtry of Aberbrothick, having aided him on this occaſion, it ſhould not turn to their prejudice *.

ALEXANDER III. married Margaret, daughter to Henry III. of England, and was in perfect good underſtanding with that kingdom during his whole reign. He was but once obliged to take up arms, and the occaſion was, to reſiſt an invaſion by Acho king of Norway, who landed at Ayr,

* Chartulary of Aberbrothick, fol. 74.

Auguſt 1263; nor was this war of any continuance. Acho was defeated on land, and his fleet ſuffered by a ſtorm, which obliged him to retire not many months after his landing. Alexander, ſome years thereafter, *viz.* 25th July 1281 *, contracted his daughter Margaret to Eric the young king of Norway, and bound himſelf for a tocher of 14000 merks Sterling; a fourth part to be inſtantly advanced, a fourth part to be paid 1ſt Auguſt 1282, a fourth part 1ſt Auguſt 1283, and the remaining fourth 1ſt Auguſt 1284; but providing an option to give land for the two latter ſhares, at the rate of 100 merks of rent for 1000 merks of money.

THIS ſum, which Alexander contracted in name of portion with his daughter, amounted to about 28000 *l.* Sterling of our preſent money†; too great a ſum to be raiſed out of his own funds: and as by law he was intitled

* Rymer, vol. II. p. 1079. † Ruddiman's preface to Anderſon's Diplomata Scotiæ.

intitled to demand aid from his vaſſals upon this occaſion, there can be little doubt that the ſum was levied by ſome ſort of tax or contribution. He had recent authority for laying this burden upon his ſubjects, *viz.* that of his father-in-law Henry III. *; and if his ſubjects were to be burdened equally, it was neceſſary to aſcertain the value of the whole lands in the kingdom. Poſſibly he might take a hint of this valuation from the ſtatute 4th Edward I. *anno* 1276, directing a valuation to be made of the lands, caſtles, woods, fiſhings, &c. of the whole kingdom of England. And the rent aſcertained by ſuch valuation got the name of extent; becauſe the lands were eſtimated at their utmoſt value or extent †. One thing is certain, that there was a valuation of all the lands of Scotland in the reign of Alexander III. the proof of which ſhall be immediately produced, and there is not upon record any event to be a motive for

* Spelman's Gloſſary, (voce) Auxilium. † Cowel's Dictionary, (voce) Extent.

an undertaking ſo laborious other than levying the ſaid ſum.

ALEXANDER III. left no deſcendants but a grand-daughter, commonly called the Maid of Norway; and ſhe having died unmarried and under age, Scotland was miſerably harraſſed by Edward I. of England, who laid hold of the opportunity of a diſputed ſucceſſion to enſlave this kingdom. Robert Bruce, by unwearied oppoſition, got peaceable poſſeſſion of the crown, *anno* 1306, and though he ſeized upon the lands belonging to Baliol and the Cummins, and made conſiderable profit by leſſening the weight of money in the re-coinage, yet, by a long train of war and inteſtine commotions, the crown-lands were ſo waſted, that, towards the end of his reign, it became neceſſary for him to petition the parliament for a ſupply. Upon the 15th July 1326, the parliament being conveened at Cambuſkenneth, the laity agreed to give him during his life the tenth penny of all

their

their rents, *tam infra burgos et regalitates quam extra*, " according to the old extent " of the lands and rents in the time of " Alexander III." This curious deed, a copy of which is annexed *, contains an exception in theſe words; " Excepta tan- " tummodo deſtructione guerræ, in quo " caſu fiet decidentia de decimo denario " præconceſſo, ſecundum quantitatem fir- " mæ, quæ occaſione prædicta de terris et " redditibus prædictis levari non poterit, " prout per inquiſitionem per vicecomitem " loci fideliter faciendam poterit reperiri."

HERE is compleat proof of a valuation in the reign of Alexander III. named in the indenture, the *Old Extent*. And as the neceſſity of the caſe affords real evidence that the tax was levied, we have no reaſon to doubt, that every man whoſe rents had fallen by the diſtreſſes of war, took the benefit of the foregoing clauſe, to get his lands revalued by the ſheriff, that he might

* Appendix, N°. 4,

might pay no more than a juſt proportion of the tax.

WE have now materials ſufficient for an explanation of the *valent* clauſe in our retours. At what time it came into practice, is altogether uncertain. If this clauſe was not made a part of the brieve of inqueſt before the days of Alexander III. there was little occaſion for it, after the extent made in that reign, till the great baronies were ſplit into parts, and the King's vaſſals were multiplied. One thing we may rely on as certain, that before the 1326, when the ſaid indenture paſſed between King Robert and his parliament, one extent only was mentioned in retours, *viz.* that of Alexander III. Nor before that period was there any occaſion for a double extent here more than in England. Of this I reckon we may be convinced by what follows. In levying the caſualties of ſuperiority, ſuch as ward, nonentry, &c. it was not the genius of this country, to ſtretch

ſtretch ſuch claims to the utmoſt, by ſtating the juſt and true rent of the land upon every occaſion. Such a fluctuating eſtimation, ſevere upon vaſſals, would at the ſame time have been troubleſome to ſuperiors. The King, and, in imitation of him, other ſuperiors were ſatisfied with a conſtant fixed rent to be a general rule for aſcertaining the caſualties, without regarding any occaſional increaſe or diminution of rent. The extent in the reign of Alexander III. was probably the full rent, and muſt have continued a pretty juſt valuation for many years. This extent then became the univerſal meaſure of the caſualties of ſuperiority. If a barony remained entire as in the days of Alexander III. there was no occaſion for witneſſes to prove the rent: it was found in the rolls containing the old extent. If a barony was ſplit into parts, the rent of the ſeveral parcels was found in the retours, being a proportion of the old extent of the whole. Hence this *quære* in the brieve, *Quantum valent*

valent dictæ terræ per annum, came to have a fixed and determined meaning; not what theſe lands are worth of yearly rent at preſent, but what they were worth at the laſt general valuation; or, in other words, what they are computed to in the rolls containing the old extent.

THUS the matter ſtood, and behoved to ſtand, at the date of the indenture 1326, which laid a foundation for a re-valuation, not of the whole lands in Scotland, but only of what were waſted by war. Suppoſing now ſuch a re-valuation, of which we can entertain no reaſonable doubt when it was in favour of vaſſals, it behoved to be the rule, not only for levying the tax then impoſed, but alſo for aſcertaining the caſualties of ſuperiority. If ſo, it was neceſſary to take notice of this new valuation in the retours of theſe lands, and conſequently in the brieve, which was the warrant of the retour. The clauſe, *quantum valent*, contained in the brieve, could not

anſwer

anſwer this purpoſe, becauſe that clauſe regarded only the old extent, and was a queſtion to which the old valuation of the land was the proper anſwer. A new clauſe therefore was neceſſary, and the clauſe that was added, points out ſo preciſely the re-valuation authorized by this indenture, as to afford real evidence, that the clauſe muſt have been contrived ſoon after it. The clauſe as altered runs thus: *Et quantum nunc valent dictæ terræ, et quantum valuerunt tempore pacis.* It was extremely natural to characterize the old extent by the phraſe *tempore pacis*, not only as made in a peaceable reign, but alſo in oppoſition to the new extent occaſioned by the devaſtation of war. I need only further remark, that this new clauſe behoved to be ingroſſed in every brieve; becauſe, with reſpect to any particular land-eſtate, it could not beforehand be known, whether it had been waſted by war or not.

BUT, beſides conjecture, there are facts which will put this matter beyond controverſy. I have not hitherto diſcovered a retour of land held of the King, ſo ancient as the 1326; but of that period there are preſerved authentick copies of many retours of lands held of biſhops, monaſteries, &c. who had the privilege of a chancery. And we have no reaſon to doubt, that the great barons who had this privilege, were ambitious of copying after the King's chancery in every article. The firſt retour I ſhall mention, happens to be a very lucky authority; for it verifies a fact which I have mentioned above upon the faith of conjecture, that at the date of the indenture 1326, there was but one extent mentioned in the brieve and retour. The retour I appeal to, is that of the land of Orroc in the county of Fife, held of the abbay of Dunfermline, dated the 20th May 1328, the *valent* clauſe of which runs thus: *Item dicunt quod prædictæ terræ de Orroc valent per annum* 12 *l.* This retour at the ſame time

time ſhows, that the alteration in the *valent* clauſe was not then introduced, which is not wonderful, when the retour is but a year and ten months after the indenture *. The moſt ancient retour I have ſeen after that now mentioned, bears date in the 1359, being of land held of the ſame abbay. Before this time, probably ſeveral years, the alteration of the *valent* clauſe was made; for in this retour it runs thus: *Et dictæ terræ valebant tempore bonæ pacis* L. 13:6:8. *et nunc valent* L. 10:13:7. There are in that period many other retours mentioning two extents, diſtinguiſhing them in the ſame manner. And uniformly the *valuerunt tempore pacis* is greater than the *nunc valent;* which puts it paſt doubt, that the *nunc valent* refers to the

* SINCE writing what is above, I have ſeen a copy, not, properly ſpeaking, of a retour, but of a valuation of the lands of Kilravock and Eaſter-Gedies, *anno* 1295, in which the *valent* clauſe runs thus: "Quod terra de Kilravock "cum omnibus pertinentiis ſuis, ſciz. cum molendinis bra- "cinis quarellis et boſco valet per annum 24 lib. item "dixerunt quod terra de Eaſter-Gedies cum molendino et "bracinis valet per annum 12 lib."

new extent authorized by the ſaid indenture. Some retours indeed there are of that period, where the *valuerunt tempore pacis* and the *nunc valent* are the ſame. But it is eaſy to account for that circumſtance: becauſe from the indenture it appears, that but a part of our lands were waſted by war; and the retours now mentioned muſt be of lands which were not ſo waſted.

DOWN to the days of our James I. I take it to be certain, that the two extents mentioned in retours, were theſe of Alexander III. and Robert Bruce. In James's reign we obſerve an alteration, which cannot be explained without going on with the hiſtory of the publick taxes. The next tax that deſerves to be taken notice of, was in the reign of David II. This King was taken priſoner by the Engliſh at the battle of Durham *anno* 1346, and was releaſed *anno* 1365; after agreeing to pay for his ranſom 100,000 *l.* Sterling within the

the ſpace of twenty five years. And there is good evidence that the whole was paid before the year 1383 *. This immenſe debt, contracted for redeeming the King from captivity, came to be a burden upon his vaſſals, by the very conſtitution of the feudal law, abſtracting from the authority of parliament. It muſt therefore have been levied as a publick tax, which appears to be the caſe from the rolls of that King ſtill extant in exchequer. And as there is no veſtige of any new valuation at this time, the old extent, *viz.* that of Alexander III. muſt have been the rule; except ſo far as it was altered by the partial valuation in the reign of Robert I. And what puts this paſt doubt is, that the new extent continued to be lower than the old extent, or extent *tempore pacis*, during this King's reign, and until the reign of James I.

JAMES I. having been many years detained in England, obtained his liberty upon

* Rymer, vol. VI. p. 464. vol. VII. p. 417.

upon giving hoſtages for payment of 40,000 *l.* Sterling, demanded under the ſpecious title of alimony. Of this ſum 10,000 *l.* was remitted by Henry VI. at that time King of England, upon James's marrying a daughter of the duke of Somerſet. In the parliament 1424, proviſion was made for redeeming the hoſtages by a ſubſidy granted of the twentieth part of lands, moveables, &c. * In order to levy this tax, a valuation was directed of lands as well as of moveables. And this new valuation of lands became proper, if not neceſſary, upon the following account, that the reaſon for making the new extent in the 1326 no longer ſubſiſted. The lands which at that time had been waſted by war, were now reſtored to their wonted value; and yet without a new valuation, theſe lands could only be taxed according to the extent 1326. And with this ſpecial reaſon concurred one more general, which is, than an extent, if the commerce of land

* Black acts, p. 1624. C. 10, 11.

land be free, cannot long be a rule for levying publick taxes. For by ſucceſſion, purchaſe, and other means of acquiring property, parcels of land are united into a a whole, or a whole ſplit into parcels, which acquire new names, till, by courſe of time, it comes to be a matter of uncertainty, what lands are meant by the original name preſerved upon record. This reaſon ſhows the neceſſity of new extents from time to time; for after the connection betwixt land and the name it bears in the extent rolls is loſt, theſe rolls can no longer be of uſe for proportioning a tax upon ſuch land.

IT was appointed by the act impoſing the ſubſidy, that this extent ſhould be made and put in books, betwixt and the 13th July then next; and that it was made, and alſo that the ſubſidy was levied, appears from the continuator of Fordon *. He reports, that it amounted the firſt year to

* L. 16. cap. 9.

to 14000 merks, that the ſecond year it was much leſs, and the people beginning to murmur, that the tax was no longer continued. But we have ſtill a better authority than the continuator of Fordon, to prove that the extent was made, *viz.* ſeveral retours recently after the 1424, where the new extent is uniformly greater than the old extent, or extent *tempore pacis*. Theſe muſt refer to ſome late extent, and not to the extent 1326, which behoved to be leſs than the old extent. Of theſe retours the moſt ancient I have met with is dated 1431, being of the lands of Blairmukis, held of the Baron of Bothvill, in which James de Dundas is retoured heir to James de Dundas his father, "Qui ju-"rati dicunt quod dictæ terræ nunc valent "per annum 20 mercas, et valuerunt tem-"pore pacis 100 ſolidos*."

SINCE there was a new extent of the whole lands of Scotland, which muſt have been

* N. B. THIS retour is in the hands of Sir John Inglis of Cramond.

been the rule for levying the caſualties of ſuperiority, as well as the tax then impoſed, one is naturally led to enquire, what was the uſe of continuing in the brieve of inqueſt the *quære* about the two different extents? why not return to the ancient form ſpecifying one extent only, *viz.* the preſent extent? In anſwer to this, it muſt be yielded, that there could ly no objection to this innovation had it been intended. But by this time the rule had prevailed of preſerving inviolably the ſtile of judicial writs; and as to queſtions ſo eaſy to be anſwered, the innovation probably was reckoned a matter of no ſuch importance, as to occaſion an alteration in the ſtile of the brieve of inqueſt. One thing is certain, that the ſtile remains the ſame without any alteration ſince the days of King Robert I. The brieve and retour obtained however a different meaning; ſo far as that the *nunc valent*, by which formerly was meant the extent 1326, came afterwards to mean the extent 1424. For inſtance, the retour

of the lands of Tullach, held of the abbey of Aberbrothick, bearing date 1438, has the *valent* clauſe thus: *Valent per annum* L. 33 : 6 : 8, *et tempore pacis valuerunt* L. 10. Another inſtance is a retour of the lands of Forglen, held of the ſame abbey, dated 1457, *Valent nunc per annum* 20 *merks, et valuerunt tempore pacis* L. 10. That by the *nunc valent* in theſe two retours muſt be meant the late extent of James I. is evident from the following circumſtance, that inſtead of being leſs than the extent *tempore pacis*, which the extent 1326 conſtantly was, it is conſiderably greater.

As the extent 1424 was uniformly ingroſſed in every retour, in anſwer to the *quantum nunc valent* in the brieve, this practice came to be exceeding favourable to vaſſals in counting for the caſualties due by them; becauſe in every ſuch account this extent was taken for the true rent of the land. By the gradual ſinking of the value of money and the improvement of land,

land, the benefit which vaſſals had by this form of ſtating accounts, came to be too conſiderable to be overlooked. The value of the King's caſualties by this means gradually diminiſhing, the matter was taken under conſideration by the legiſlature, and produced the act 55. p. 1474, ordaining, "That it be anſwered in the retour, of "what avail the land was of old, and the "very avail that it is worth and gives, the "day of ſerving the brieve."

I formerly inclined to think, that it was not the meaning of this ſtatute, to require a new proof of the rent of land every time it was retoured upon a brieve of inqueſt. I ſuſpected that there had been ſome new general valuation of the lands in Scotland recently before the ſtatute, and that the ſtatute referred to this valuation. And I was encouraged to embrace this opinion, by finding in the records of parliament *, a tax impoſed of *L.* 3000, for defraying

* 1467, acts 74, 79, 86.

the expence of an embaſſy to Denmark, and a general valuation appointed in order to levy that tax. Commiſſioners are named to take the proof, and certain perſons appointed, one out of each eſtate, to receive the ſums that ſhould be levied. And that this muſt have been the caſe, appeared probable, upon finding, that the new extent, even after this period, was not leſs uniform than formerly, and therefore that it could not correſpond to the true rent of land, which all the world know is in a continual fluctuation. But if after all there enſued no new valuation of the land-rent of this kingdom, of which there is not the ſlighteſt veſtige, the ſtatute muſt be taken in its literal meaning, becauſe it can admit of none other. I have ſtill better authority for adhering to the literal meaning of this ſtatute, *viz.* the proceedings of the ſovereign court, while the ſtatute was freſh in memory. The Earl of Bothwell, donator to the relief and nonentry of the barony of Balinbreich, brought a reduction againſt

the

the Earl of Rothes proprietor, of his retour of that barony upon this medium, that they were retoured to 200 merks only for the new extent, though the rent really amounted to a much greater ſum. It was proved before the court, that the barony paid 500 merks of rent; and upon this medium the retour was reduced *. And the like was done with reſpect to the retour of the lands of Shield and Drongan, which were retoured to *L.* 42 of new extent, and yet were proved by witneſſes to be 100 merks of yearly rent †.

IN the retours accordingly, that bear date recently after the ſtatute, we find a ſudden ſtart of the new extent, and a much greater diſproportion than formerly betwixt it and the old extent. In the chartulary of the abbey of Aberbrothick, there is a copy of a retour of certain lands, dated *anno* 1491, the particulars of which are, *Terræ de Pittarrow valent*

* 22d October 1489. † 13th February 1499, The King *contra* Crawford.

valent nunc L. 22. *tempore pacis* L. 8. *Terræ de Cardinbegy valent nunc* L. 13, *et tempore pacis* L. 5. *Terræ de Auchingarth valent nunc* 5 *merks, tempore pacis* 2 *merks.* In the chartulary of the abbey of Dunfermline there is a copy of a retour of the lands of Clunys, held of that abbey, bearing date *anno* 1506, *Valent nunc* 50 *merks et tempore pacis* L. 4. I have had occaſion to mention a retour of the lands of Forglen, held of the abbey of Aberbrothick, dated *anno* 1457, of which the new extent is 20 merks, and the old extent is L. 10. In the ſame chartulary, there is luckily another retour of the ſame lands, bearing date *anno* 1494, of which the *valent* clauſe is in the following words, *Valent nunc* L. 20. *et valuerunt tempore pacis* 20 *merks.* The difference in ſo ſhort a time as 37 years betwixt 20 merks and L. 20 of new extent, is real evidence, that the act of parliament was duly obſerved in making out the retour laſt-mentioned. But from the compariſon of theſe two retours, a more curious obſervation occurs, *viz.*

viz. that retours of lands held of ſubject-ſuperiors, are not much to be relied on as evidence of the old extent. In the firſt of theſe retours the old extent is ſtated at *L.* 10, in the other at 20 merks; occaſioned by a blunder of the inqueſt, who ingroſſed as the old extent in the retour they were forming, the new extent contained in the former retour. Many ſuch blunders would probably be diſcovered, had we a full record of old retours. And it need not be ſurpriſing, that in ſuch retours little attention was given to the *valent* clauſe, which was reckoned a matter merely of form. For though the publick taxes were levied from the King's vaſſals according to the old extent, yet in proportioning the relief which a Baron had againſt his own vaſſals, there is little doubt that the true rent was made the rule. The new extent was of more conſequence, becauſe it was the rule for the nonentry duties, before a declarator of nonentry was raiſed by a Baron againſt the heir of his vaſſal.

IT may be remarked here by the by, that the act 1474 is real evidence of a flouriſhing ſtate of affairs after our James I. got poſſeſſion of his throne. From the valuation 1424 to the ſaid act, there paſſed but fifty years; and the land rent of Scotland muſt have increaſed remarkably during that period, to make the act 1474 neceſſary. But that Monarch in his younger years was diſciplined in the ſchool of adverſity. During a tedious confinement of eighteen years, he had ſufficient leiſure to ſtudy the arts of government; and probably he made the beſt uſe of his time. It is certain, that before his reign we had no experience and ſcarce any notion of a regular government, where the law bears ſway, and the people peaceably ſubmit to the authority of law. But to return to our ſubject.

As by the ſtatute now mentioned, the ſuperior's caſualties were raiſed to their higheſt pitch, it was impracticable to ſupport

port them long at that height, in oppoſition to the general bias of the nation in favour of Vaſſals. The notion had been long ago broatched, and was now firmly eſtabliſhed, that the vaſſal was proprietor, and conſequently that ward, relief, and nonentry were rigorous and ſevere caſualties. We have Spotſwood's authority, in his hiſtory of the church of Scotland, that loud complaints were made againſt theſe caſualties early in the reign of James IV. But why at this period in particular, for we do not find the ſame complaints afterwards; at leaſt they make no figure in the annals of more recent times? The act we have been diſcourſing about affords a ſatisfactory anſwer. Theſe caſualties, in conſequence of the ſtatute, were more rigorouſly exacted than formerly. And we ſhall now proceed to ſhow, that they were very ſoon brought down to a moderate pitch, notwithſtanding the ſtatute. In ſerving a brieve of inqueſt, it is certain the practice did not long continue, of taking a

proof by witneſſes of the true rent of the land. The old method was revived, of making a former extent the rule. If the land was once retoured as preſcribed by the ſtatute, the old and new extent ingroſſed in that retour were continued in the following retours. If there was no retour, a proportion of the old and new extent of the whole barony was taken. And where that was not to be had, it was the method, to ingroſs a new extent bearing a certain proportion to the old extent. For the laſt we have Skene's authority (*voce* Extent). His words are: "The Lords of "ſeſſion eſteem a merk-land of old ex-"tent to four merk-land of new extent." And he cites a deciſion, *viz.* 21ſt March 1541, Kennedy *contra* Mackinnald, which ſeems to import ſo much; though but obſcurely, becauſe the caſe is not diſtinctly ſtated. The proceſs being for the non-entry duties of a five merk-land, it is ſaid to have been proved, that the land payed of rent four merks for every one of the

ſaid

ſaid five merks; and I muſt acknowledge, that the manner of expreſſion ſeems to point at ſome general rule, rather than at a proof by witneſſes. If this be the meaning of the deciſion, it is the firſt caſe I have obſerved, where this deviation from the ſtatute was authorized by the ſovereign court; and a notable deviation it was, to take up with ſuch an imaginary rule for aſcertaining the rent of the land, when the ſtatute directed a proof by witneſſes of the true rent. But when the act came once to be neglected, the court was more explicit in their judgments on this point. In a caſe obſerved by Balfour, (Title of Brieves and Retours) 17th July 1562, Queen's Advocate and Lord Drummond *contra* George Muſhet, a general rule is eſtabliſhed directly in face of the ſtatute; which is, that when lands pay farm-victual, poultry, *&c.* the inqueſt are not bound to take inquiſition of the yearly rent, nor to convert ſuch caſualties into money. And the reaſon given is re-

markable, *viz.* that the price of ſuch caſualties is ſo changeable that no certain or fixed ſum can be aſcertained. This is a very bad reaſon upon the plan of the ſtatute, though it ſerves to ſhow the ſenſe of the nation, which the ſtatute had not eradicated, that the new extent ought to be fixed and uniform as well as the old. At the ſame time, as the land-rent in Scotland was generally paid in victual, this deciſion was in effect a repeal of the ſtatute; of which we need not doubt, that the proprietors, whoſe rents were paid in money, would take advantage. And the act 1474 came in this manner to be ſo univerſally neglected, that it was eſtabliſhed as a matter of right, that the new extent ſhould always be lower than the true rent; and for this we have the beſt authority. The act 6. p. 1584 impowering the King to feu out his annexed property, has the following clauſe. "Providing always that the "ſaidis infeftments of feuferme be not "maid within the juſt avail, to the pre-

"judice

" judice and hurt of our ſovereign Lord " and his ſucceſſoures: That is to ſay, " within the dewtie to the quilkis the " ſaidis landis are retoured, or may be juſt- " ly retoured, for the new extent. Quhilk " new extent his hieris, with advice for- " ſaid, declaires to be the juſt avail of the " ſaidis lands, for the quhilk the ſamen " may be ſet in feu-farm." Here it is clearly ſuppoſed, that the new extent is a favourable eſtimation of the rent, and lower than what is truly paid for the land.

N. B. For the materials employed in this tract, the author is indebted to Mr. John Davidſon clerk to the ſignet, whoſe extenſive knowledge reflects honour upon the ſociety to which he belongs.

APPENDIX.


BRITISH MUSEUM
19
51
NOV

APPENDIX.

NUMBER I.

COPY of a SEISIN, which proves that the *Jus Retractus* was the law of Scotland in the fifteenth century, as obſerved vol. I. p. 158.

IN DEI NOMINE Amen. Per hoc præſens publicum inſtrumentum cunctis pateat evidenter, Quod anno ab incarnatione ejuſdem 1450 menſis vero Januarii Die antepenultima, indictione 14ta Pontificatus ſanctiſſimi in Chriſto Patris ac Domini noſtri Domini Nicholai divina providentia Papæ quinti anno quarto, In mei notarii publici et teſtium ſubſcriptorum præſentia

præſentia perſonaliter conſtitutus providus vir Robertus Gyms burgenſis de Linlithgow expoſuit qualiter per breve Domini noſtri Regis de compulſione legittime obtinuit ſuper hæreditate quondam Johannis Gyms fratris ſui ſummam octoginta quindecem librarum coram balivis dicti burgi in curia, pro qua quidem ſumma balivi tunc temporis exiſtentes ſibi poſſeſſionem de tenemento dicti quondam Johannis ex parte occidentali fori jacente ex aviſamento conſilii tradiderunt. Et quia dictus Robertus, magna neceſſitate compulſus, dictum tenementum alienare propoſuit, ad ſuæ vitæ neceſſaria ſupportanda, eo quod nullus alius amicorum inventus fuerat qui ſibi tempore neceſſitatis ſuccurrere propoſuit excepta ſolummodo Thoma de Forreſt ejus conſanguineo, prefatus Robertus ballivos dicti burgi cum inſtantia ſpecialiter ſupplicavit quatenus ſecum uſque ſolum dicti tenementi properare curarent, quo facto dictus Robertus totum jus et clameum quod in dicto tenemento habuit ratione dictæ ſummæ recuperatæ

præfato

prefato Thomæ de Forreſt ſurſum reddidit ac ſibi poſſeſſionem corporalem exinde tradidit per manus honorabilis viri Alexandri de Hathwy tunc temporis ballivi dicti burgi ſibi et hæredibus ſuis et aſſignatis futuris temporibus permanſuram quouſque de dicta ſumma principali plenarie fuerit ſatisfactum, ſuper quibus omnibus et ſingulis dictus Thomas de Forreſt a me notario publico infra ſcripto ſibi fieri petiit publicum inſtrumentum. Acta fuerant hæc ſupra ſolum dicti tenementi hora quaſi ſecunda poſtmeridiem anno DEI menſe indictione et pontificatu quibus ſupra, præſentibus providis viris David de Crawfurd Johanne Kemp ballivis, Thoma de Foulis Johanne Simſon Thoma Henriſon Henrico Cauchlyng Johanne Collano et Johanne Chalon ſerjandis cum multis aliis teſtibus ad præmiſſa vocatis ſpecialiter et rogatis.

Et ego Jacobus de Foulis clericus Sancti Andreæ dioceſios publica authoritate imperiali notarius prædictis omnibus

et ſingulis dum ſic ut præmittitur fierent et agerentur una cum prænominatis teſtibus præſens perſonaliter interfui, eaque ſic fieri dici, vidi et audivi, indeque præſens inſtrumentum aliena manu ex meo mandato ſcriptum confeci et meis ſigno et ſubſcriptione manu propria roboravi una cum appenſione ſigilli dicti Alexandri Hathwy ballivi propter majoris roboris et teſtimonium premiſſorum.

COPY

NUMBER II.

COPY Bond Sir Simon Lockhart of Ley, to William of Lindſay Rector of the church of Ayr, for an annualrent of *L.* 10 Sterling out of the lands of Ley, *anno* 1323, referred to vol. I. p. 242.

[*The Principal is in the charter-cheſt of John Lockhart of Ley.*]

OMNIBUS hanc cartam viſuris vel audituris Simon Locard miles dominus del Lay et Cartland infra vicecomitatem de Lanerk ſalutem in Domino ſempiternam. Noveritis univerſitas veſtra me pro me et hæredibus meis quibuſcunque conceſſiſſe et vendidiſſe ac prædictas conceſſionem et venditionem præſenti carta

confirmaſſe diſcreto viro domino Willielmo de Lindeſay rectori æccleſiæ de Ayr decem libras Sterlingorum annui redditus percipiendas annuatim in terris meis de Cartland et de Lay prædictis pro quadam ſummæ pecuniæ mihi præ manibus perſolutæ de qua teneo me bene contentum, ſolvendum prædictum annuum redditum præfato domino Willielmo hæredibus ſuis et ſuis aſſignatis in manreio loco de Lay ſupradicto per me et hæredes meos ad duos anni terminos, viz. centum ſolidos ad feſtum Pentecoſtes et centum ſolidos ad feſtum Sancti Martini in hieme, primo vero termino ſolutionis incipiente ad feſtum Pentecoſtes anno Domini milleſimo tricenteſimo viceſimo tertio, tenen. et haben. dictum annuum redditum decem librarum præfato domino Willielmo hæredibus ſuis et ſuis aſſignatis quibuſcunque libere quiete bene et in pace in perpetuum, ad quemquidem annuum redditum decem librarum fideliter et ſine aliqua contradictione ſolvendum loco et terminis ſupra dictis ut prædicitur obligo pro me et hæredibus

dibus meis prædictam terram de Cartland et de Lay una cum omnibus bonis et catellis in iisdem terris inventis seu inveniendis ad districtionem prædicti domini Willielmi hæredum suorum vel suorum assignatorum qotiescunque defecero seu aliquis hæredum meorum defecerit in solutione dicti annui redditus decem librarum in toto vel in parte predictis loco et terminis, tam ad restitutionem dampnorum et expensarum si quæ fuerint quam ad solutionem prædicti annui redditus nullo proponendo obstante. Ego vero Simon et hæredes mei prædicto domino Willielmo hæredibus suis et suis assignatis quibuscunque prædictum annuum redditum decem librarum, pro prædictæ pecuniæ summa in prædictis manibus ut prædictum est persoluta, contra omnes gentes warrantizabimus acquittabimus et in perpetuum defendemus. In cujus rei testimonium sigillum meum præsenti cartæ apposui et ad majorem hujus rei evidentiam et sigilli mei testimonium nobilis vir dominus Walterus Senescallus Scotiæ ad instantiam

meam

meam ſigillum ſuum huic cartæ ſimiliter appoſuit. His teſtibus nobili viro domino Waltero Seneſcallo ſuperdicto, domino Gervaſo abbate de Newbottle, domino Davide de Lindeſay domino de Crawford, domino Roberto de Herris domino de Nidſdale, domino Richardo de Hay, domino Jacobo de Cuninghame, domino Adamo More, domino Jacobo de Lindſay, domino Waltero filio Gilberti et domino Davide de Graham militibus et Reginaldo More et multis aliis.

BOND by James of Douglas Lord of Balvany, from the original, found among the papers of Baillie of Walſtoun, referred to vol. I. p. 242.

BE it kende till all men be thir preſent letteris me Jamis of Duglas lorde of Balwany ſekyrly to be haldyn and thrw thir preſent letteris lely to be obliſt tyll a worſchepyll man & my cuſing Schir Robert of

of Erſkyn lorde of that ilk in fourty pund of uſuale moneth of Scotland now gangand for cauſe of pure lane thrw the forſaide Schir Robert to me lent before hand in my gret myſter to be payt to the fornemmyt Schir Robert or tyll his ayre executuris or aſſignes at the feſt of Whitſonday and Martynmas in wynter nexit eftir the makyn of thir preſent letteris be evynlyk porciounis in maner & forme as eftir folous, that is to ſay, that all the landis of the barounry of Sawlyn with the appurtiones lyand within the Schiradome of Fife the quhilkis I haf in intromettyng of Alexander of Halyburton lorde of the ſayd landis ſall remayne with the ſayde lorde with all fredomes esis & commoditeis courtis & playntis & eſchetis quhill he the ſaid lord of Erſkyn his ayris executuris & aſſignes be fully aſſitht of xl. punde as is beforſayde. And gif it hapnes as God forbede that the ſaid Schir Robert be nocht aſſitht be ony maner of way of the ſaid landis of Sawlyn I the ſaid Jamis oblis &

byndis

byndis all my landis of the lordſchip of Dunſyare to be diſtrenzit als wele as the landis of Sawlyn at the wyll of the ſaid Schir Robert his ayris or aſſignes quhill he or thai be aſſitht of the fornemmyt ſowme as he or thai ſuld ſtrenze thair propir landis as for thair awyn mail without leſe of ony juge ſeculer or of the kirk. In the witnes of the quhilk thing to thir preſent letteris I haf ſett my ſele at Lynlithqw the aucht day of May the zere of grace MCCCC & XVIII.

OLD

NUMBER III.

OLD STILE of letters of poinding the ground, founded on the infeftment without a previous decree, referred to vol. I. p. 253.

JAMES by the Grace of God, King of Scottis to our lovites ——— Andrew Foreman meſſenger our ſherrifs in that part conjunctly and ſeverally ſpecially conſtitute, greeting: FORASMUCHAS it is humbly meant and ſhown to us, by our lovite oratrix and wido Katherine Greg the relict of umquhile Alexander Forreſter of Killennuch, THAT WHERE ſhe has the lands of Weſter Crow, with the pertinents, lying within the ſtewartry of Menteith, and ſherrifdom of Perth, pertaining to the ſaid Katherine in liferent, as her infeftment made thereupon bears: NOTTHELESS the tenants and occupiers of the ſaids lands reſts awind to her the mealls and duties there-

of, of certain terms of langtime bypaſt, and will make no payment thereof unleſs they be compelled, to her heavy damage and ſkaith, as is alledged. OUR WILL is therefor, and we charge you ſtraitly and command, that, incontinent thir our letters ſeen, ye paſs, concurr, fortify, and aſſiſt the ſaid Katherine and her officiaris, in the poinding and diſtrinzying the tenants and occupyers of the ſaids lands for the mealls farms and duties thereof, the two terms laſt bypaſt reſting awand by them, and make the ſaid Katherine to be paid thereof conform to her infeftment; And ſycklyke yearly and termly in time coming, and if need bees that ye poind and diſtrinzie therefor. ACCORDING to juſtice as ye will anſwer to us thereupon. The whilk to do we commit to you conjunctly and ſeverally our full power, by thir our letters, delivering them, by you duly execute and indorſt, again to the bearer. Given under our ſignet at Edinburgh, the ſeventh day of December, and of our reign the 30 zeir. *Ex deliberatione dominorum concilii.* Signd J. WALLACE.

TAX

NUMBER IV.

TAX granted by the parliament to ROBERT I. for his life, referred to vol. I. p. 288.

[*The original in the Advocates library.*]

HOC eſt tranſcriptum indenturæ concordatæ et affirmatæ inter Dominum Robertum Dei gratia Regem Scottorum illuſtrem, et comites, barones liberetenentes, communitates burgorum ac univerſam communitatem totius regni, magno ſigillo regni et ſigillis magnatum et communitatum prædictorum alternatim ſigillatum in hæc verba; Præſens indentura teſtatur, quod, quintodecimo menſis Julii anno ab incarnatione Domini M. CCC. viceſimo ſexto, tenente plenum parliamentum ſuum apud Cambuſkenneth ſereniſſimo Principe Domi-

no Roberto Dei gratia Rege Scottorum illuſtri, convenientibus ibidem comitibus, baronibus, burgenſibus et ceteris omnibus liberetenentibus regni ſui, propoſitum erat per eundem Dominum Regem, quod terræ et redditus, qui ad coronam ſuam antiquitus pertinere ſolebant, per diverſas donationes et tranſlationes, occaſione guerræ factas, ſic fuerant diminuti quod ſtatui ſuo congruentem ſuſtentationem non habuerit, abſque intollerabili onere et gravamine plebis ſuæ: Unde inſtanter petiit ab eiſdem, quod cum tam in ſe, quam in ſuis, pro eorum omnium libertate recuperanda et ſalvanda, multa ſuſtinuiſſet incommoda, placeret eis, ex ſua debita gratitudine, modum et viam invenire per quem juxta ſtatus ſui decentiam ad populi ſui minus gravamen congrue poſſet ſuſtentari. Qui omnes et ſinguli comites, barones, burgenſes et liberetenentes, tam infra libertates quam extra, de Domino Rege, vel quibuſcunque aliis dominis infra Regnum mediate vel immediate tenentes, cujuſcunque fuerint conditionis,

tionis, considerantes et fatentes præmissa Domini Regis motiva esse vera, ac quamplura alia, suis temporibus, eis per eum commoda accreviſſe, suamque petitionem esse rationabilem atque justam, habito super præmissis commune ac diligenti tractatu, unanimiter gratanter et benevole concesserunt et dederunt Domino suo Regi supradicto annuatim ad terminos Sancti Martini et Pentecostes, proportionaliter, pro toto tempore vitæ dicti Regis, decimum denarium omnium firmarum et reddituum suorum, tam de terris suis dominicis et wardis quam de ceteris terris suis quibuscunque infra libertates et extra, et tam infra burgos quam extra, juxta *antiquam extentam* terrarum et reddituum tempore bonæ memoriæ Domini Alexandri Dei gratia Regis Scottorum illustris ultimo defuncti, pro ministeriis ejus fideliter faciend. excepta tantummodo destructione guerræ; in quo casu fiet decidentia de decimo denario præconcesso, secundum quantitatem firmæ, quæ occasione prædicta, de terris et redditibus prædictis,

prædictis, levari non poterint, prout per inquiſitionem per vicecomitem loci fideliter faciendam poterit reperiri: Ita quod omnes hujuſmodi denarii, in uſum et utilitatem dicti Domini Regis, ſine remiſſione quacunque, cuicunque facienda, totaliter committantur: Et ſi donationem vel remiſſionem fecerit de hujuſmodi denariis antequam in Cameram Regis deferantur et plenarie perſolvantur, præſens conceſſio nulla ſit, ſed omni careat robore firmitatis. Et quia quidem magnates regni tales vendicant libertates, quod miniſtri Regis infra terras ſuas miniſtrare non poterint, per quod ſolutio Domino Regi facienda forſan poterit retardari: Omnes et ſinguli hujuſmodi libertates vendicantes, Domino Regi manuceperunt, portiones ipſos et tenentes ſuos contingentes, per miniſtros ſuos, miniſtris Regis, ſtatutis terminis plene facere perſolvi: Quod ſi non fecerint, vicecomites Regis quilibet in ſuo vicecomitatu, tenementa hujuſmodi libertatum, regia auctoritate, pro hujuſmodi ſolutione facienda diſtringant. Dominus

vero

vero Rex, gratitudinem et benevolentiam populi ſui placide ponderans et attendens, eiſdem gratioſe conceſſit, quod a feſto Sancti Martini proximo futuro, primo viz. termino ſolutionis faciendæ, collectas aliquas non imponet, priſas ſeu cariagia non capiet, niſi itinerando ſeu tranſeundo per regnum, more predeceſſoris ſui Alexandri Regis ſupra dicti: Pro quibus priſis et cariagiis plena fiat ſolutio ſuper unguem: Et quod omnes groſſæ providentiæ Regis cum earum cariagiis, fiant totaliter ſine priſis. Et quod miniſtri Regis, pro omnibus rebus ad hujuſmodi groſſas providentias faciendas, ſecundum commune forum patriæ, in manu ſolvant ſine dilatione. Ceterum conſenſum eſt et concordatum inter Dominum Regem et communitatem regni ſui, quod, ipſo Rege mortuo, ſtatim ceſſet conceſſio decimi denarii ſupradicti. Ita tamen quod de terminis præteritis ante mortem ipſius Domini Regis plenarie ſatisfiat. Et quod nec per præmiſſa, vel aliquod præmiſſorum, poſt hujuſmodi conceſſionem finitam

nitam, hæredibus dicti Domini Regis aut communitati regni ſui aliquatenus fiat præjudicium, ſed quod omnia in eundem ſtatum redeant et permaneant, in quo erant ante diem præſentis conceſſionis. In quorum omnium teſtimonium, uni parti hujus indenturæ, penes dictos comites, barones, burgenſes et liberetenentes reſidenti, appoſitum eſt commune ſigillum regni: Alteri vero parti, penes Dominum Regem remanenti, ſigilla comitum, baronum et aliorum majorum liberetenentium una cum communibus ſigillis burgorum regni, nomine ſuo et totius communitatis concorditer ſunt appenſa. Dat. die, anno et loco ſupradictis. Et hoc tranſcriptum penes magnates et communitates prædictos et eorum ſucceſſores, remanſurum, ſigillo regni conſignatur, in teſtimonium et memoriam futurorum. Datum apud Edinburgum, in parliamento Domini Regis tento ibidem, ſecunda Dominica quadrageſimæ, cum continuatione dierum ſequentium, anno gratiæ M. CCC. viceſimo ſeptimo.

Lord

NUMBER V.

Lord LILE's trial, referred to vol. I. p. 415.

Parliament of King JAMES III. holden at Edinburgh, 18th March 1481.

22 Martii quinto die parliamenti Domino Regi ſedente in trono juſticiæ.

ASSISA.

Comes ATHOLIÆ	Dominus de DRUMLANGRIG
Comes de MORTON	Dominus MAXWELL
Dominus GLAMMIS	WILLIELMUS BORTHWICK Miles
Dominus ERSKINE	ALEXANDER Magiſter de Crawfurd
Dominus OLIPHANT	SILVESTER RATRAY de Eodem
Dominus CATHKERT	ROBERTUS ABERCROMMY de Eodem, Miles
Dominus GRAY	
Dominus BORTHWICK	DAVID MOUBRAY de Bernbougale, Miles.
Dominus de STOBHALL	

Accuſatio ſuper Roberto domino Lile per rotulos ut ſequitur:

ROBERT Lord LILE yhe ar dilatit to the King's hienes that yhe have ſend lettres in Ingland to the tratour James of Dowglace, and to uthir Ingliſmen in treſſonable maner; and alſo reſavit lettres fra ye ſaid tratour, and fra uthir Ingliſmen in treſſonable manner and in furthering of ye Kings enemys of Ingland, and prejudice and ſkaith to our ſoverane Lord ye King, his realme and liegis.

QUÆ aſſiſa ſupraſcripta in præſentia ſupremi domini noſtri regis jurata, et de ipſius mandato ſuper dictam accuſationem cognoſcere per eundem ſupremum dominum noſtrum regem mandata, remota et reintrata deliberatum eſt per os Joannis Drummond de Stobhall, nomine et ex parte dictæ aſſiſæ et prolocutorio nomine ejuſdem, Dictum Robertum dominum Lile quietum fore

et

et immunem et innocentem accuſationis et calumpniationis ſupraſcript. Super quibus dictus Robertus dominus Lile petiit notam curiæ parliamenti et teſtimonium ſub magno ſigillo ejuſdem domini noſtri regis ſibi dari ſuper præmiſſis, quodquidem teſtimonium idem dominus rex ſibi conceſſit, darique mandavit eidem in forma ſupraſcripta et conſueta.

NUMBER VI.

CARTA CONFIRMATIONIS* Gilberti Menzeis, referred to vol. II. p. 62.

JACOBUS, DEI gratia, rex Scotorum, omnibus probis hominibus totius terræ ſuæ, clericis et laicis, ſalutem: Sciatis nos, quandam literam per Robertum de Keth militem, et Alexandrum de Ogilvy de Inverquhardy, vicecomites noſtros de Kincardin deputatos, ſigillis eorum ſigillatam, factam Gilberto Menzeis burgenſi burgi noſtri de Aberdeen, in curia capitali apud Bervy tenta, anno et die in infraſcripta litera expreſſis, penes proſecutionem dicti Gilberti contra Joannem de Tulch de eodem, et Walterum de Tulch filium ſuum, per brevem compulſionis capellæ noſtræ, per dictum Gilbertum impetratum de ſumma centum et ſexaginta

* Lib. 4. N°. 49. 1450 July 22d.

aginta librarum uſualis monetæ regni noſtri; et penes alienationem terrarum de Portarſtone et de Orcharfeldie infraſcriptarum, cum pertinen. de mandato noſtro, viſam, lectam, inſpectam et diligenter examinatam, ſanam, integram, non raſam, non cancellatam, ac in aliqua ſui ſuſpectam, ſed omni prorſus vitio et ſuſpicione carentem ad plenum intellexiſſe, ſub hac forma: Till all and ſundrie thir preſent letteris ſall heer or ſee, Robert maſter of Keth knight, and Alexander of Ogilvy of Inverquhardy ſherive deputes of Kincardin, greiting, in God ay leſtand, till zour univerſitie we mak knawin, That in ye ſhirriff-courte be us haldin at Inverbervy ye 28 day of the month of May, the zeir of our Lord 1442 zeiris, Gilbert Menzeis burges of Aberdeen followit Johne of Tulch of that Ilk, and Wat of Tulch his ſon, be the Kings brevis of compulſione upon a ſome of viii ſcore of punds of the uſuale mony of Scotlande, the quhilk ſome the foirſaide Johne and Wat war awande to the foirſaide Gilbert conjunctly

bundyn

bundyn be thair obligationes, and the quhilk ſome, after lauchfull proceſſe maide, ye foirſaid Gilbert optenit and wan lauchfulli beſoir us in jugement, for the payment of ye quhilks to the ſaid Gilbert to be maide, we, of autority of our office, and at command of our liege Kings precepts thairupone till us directit, findand no guidis of the foirſaide Johne nor Wat within our ſhirriffdome to mak the payment foirſaide, gert our mairs ſet a ſtrop upon the landis of ye Porterſtoun and of the Orchard feldie, and gert preſent to the four heid courts nixt thairaftir halden at Kincardine erd and ſtane, and proferit that landis to ſel for the payment of the foirſaide ſome; and at the laſt curt, quhen zire and dey was paſſit, and the procis lauchfullie provit in the curt, the foirſaide Wat of Tulch maide inſtance, to gar that actione be deleyit, in the plyght it then was to the nixt heide curt, thair to be haldin efter zule; at the quhilk heide curt haldin at Kincardine the 13 day of the month of Januar, the

zire

zire of our Lord 1443, baith perties appeirit in jugement, and thair the foirſaid Gilbert aſkit us fullfilling of law and payment to be maide him, and thairupon preſent us our liege Kings preceps of commandment, to the quhilks we, riply aviſit with men of law, Gert cheſe upe ane aſſiſe of the barony of the Merns, the grete ath ſworne, gerte tham gang out of the curt to pryſe to the foirſaide Gilbert als meikle land as might content him lauchfully of the ſome foirſaide; the quhilk aſſiſe well avyſit income and deliverit, that the foirſaide Gilbert ſulde have, as his awn propir landis, the landis of Porterſtone and the landis of Orcharfelde, with yair pertinents be tham priſit and extendit till aucht pundis worth of land for hale payment of the aucht ſcore pundis foirſaide; and we, of autority of our office, deliverit to the foirſaide Gilbert in playne curt, the landis foirſaide, to brouke and to joyſe as his awn propir landis; and for the mair ſykernes we gert our mair Tome Galmock gang with

the

the foirſaid Gilbert to the foirſaide landis and gif him heritable ſtate and poſſeſſione: The quhilk poſſeſſione was gevin in preſence of Hew Aberuthno of that Ilk, Johne Biſſit of Kinneffe, Will. of Strathachin, Johne of Pitcarne, Ranald Chene, and mony uthers, and this till all that it effeiris or may effeir in tyme to cum we make knawyne be thir preſent letteris, to the quhilks we have put to our ſellis, the zire, day, and place foirſaide. Quamquidem literam ac omnia et ſingula in eadem contenta in omnibus ſuis punctis et articulis conditionibus et modis ac circumſtantiis ſuis quibuſcunque forma pariter et effectu in omnibus et per omnia approbamus, ratificamus, et pro nobis heredibus et ſucceſſoribus noſtris, ut premiſſum eſt, pro perpetuo confirmamus, ſalvis nobis hæredibus et ſucceſſoribus noſtris, wardis, releviis, maritagiis, juribus et ſervitiis de dictis terris ante preſentem confirmationem nobis debitis et conſuetis. In cujus rei teſtimonium preſenti cartæ noſtræ confirmationis magnum ſigillum noſtrum

apponi præcipimus: teſtibus reverendis in Chriſto patribus Willielmo et Johanne Glaſguen. et Dunkelden. æccleſiarum epiſcopis, Willielmo domino Crichton noſtro cancellario et conſanguineo, predilecto cariſſimo conſanguineo noſtro Willielmo comite de Duglas et de Anandale, domino Galvidiæ, venerabili in Chriſto patre Andrea abbate de Melros noſtro confeſſore et theſaurario, dilectis conſanguiniis noſtris Patricio domino Glamis magiſtro hoſpitii noſtri, Patricio domino de Graham, Georgeo de Chrichton de Carnis admiralo regni noſtri, David Murray de Tulibardyn, militibus, magiſtris Joanne Arons archideaconen. Glaſguen. et Georgeo de Schoriſwod rectore deculture clerico noſtro. Apud Striviline, viceſimo ſecundo die menſis Julii, anno Domini Mcccc quinquageſimo, et regni noſtri decimo quarto.

LETTERS

NUMBER VII.

LETTERS of four forms, iſſued upon the debtor's conſent.

JAMES, by the grace of God, King of Scottis, to oure lovittis Robert Howieſon meſſenger, ——————— meſſengeris, our ſherriffis in that part conjunctlie and ſeverallie ſpeciallie conſtitute, greiting: FORASMEIKLEAS it is humly meint and ſhawin to us, be oure lovitt Henrie Leirmonth, ſerviter for the tyme to umquhill meſter David Borthuick of Bowhill, oure advocate for the tyme: THAT QUHAIR thair is ane contract and appointment maid betwix Johnne Forreſt Proveſt of oure burgh of Linlitgow, and Helen Cornwall his ſpouſs as principalis, and Jerem Henderſon cautioner for thaim on the ane parts, and the ſaid Henry on

the other pairt, of the dait att oure ſaid burgh of Linlitgow the 16th day of November, in the zeir of God 1576 zeirs; be the quhilk contract the ſaid Johnne and his ſaid ſpouſs ſalde and analeit heretablie ane annualrent of twelve punds monie of our realm zeirly, to be uplifted at Whit. and Mart. be equal portions, furth of all and haill thair four acres of land, callet the Lonedykes, lyand within the territorie and oure Sherrifdome of Linlitgow, boundet as is containit in the ſaid contract, and to warrant the ſaim to the ſaid complainer frae all wardis, relieves, nonentries, and otheris inconvenientis whatever, at length ſpecified and containit thairintill: LIKEAS they and thair cautioner forſaid ar bund and oblieſt conjunctlie and ſeverallie for them and thair aires, to mak thankfull payment zeirly to the ſaid Henry of the ſaid annualrent, frae the dait of his infeftment unto the lawfull redemtion of the ſamen, and to fulfill divers and ſundrie utheris headis, pointis, parts, and clauſis, ſpecified and containit in the

ſaid

ſaid contract, to the ſaid Henry, for thair pairt, as the ſamen at more length proportis; quhilk contract is actit and regiſtrat in the Lordis buiks of oure conceil and ſeſſion, and decernit to haiff the ſtrenth of thair act and decreet, with letteris and executorials of horning or poinding to paſs and bee direct thairupon, at the ſaid Henries will and pleiſer, as the ſaids Lordis decreet interponit thereto, of the dait the tenth day of June 1581 zeirs, at lenth proportis: NOTTHELESS the ſaid Johnne Forreſt, his ſpouſs and cautioner forſaid, will not obſerve keep and fulfill the forſaid contract and appointment to the ſaid Henrie, in all and ſundrie pointis and clauſis thereof, as ſpecially to mak paiment to him of the ſaid annualrent of twelve punds monie forſaid, reſtand awand to the ſaid complainer of all zeirs and terms bygane, frae the daite of the ſaid contract, and ſyklike zeirly and termly in time coming, during the nonredemtion thairof, the termis of paiment being bypaſt conforme thairto, without they be compellit.

pellit. * OURE WILL IS HEIRFOR, and we chairge you ſtrictly, and commandis, that incontinent thir oure Letters ſeen, ye paſs, and, in our name and authority, command and charge the ſaid Johnne Forreſt, Helen Cornwall his ſaid ſpouſs, and the ſaid Jerem Henderſon thair cautioner forſaid, conjunctly and ſeverally, to obſerve keip and fulfill the forſaid contract and appointment to the ſaid Henry Leirmonth, in all and ſundrie pointis partis and clauſis thereof, and ſpecially to mak payment to him of the ſaid annualrent of twelve punds monie forſaid, reſtand awand to him, of all zeirs and termis bygane, and ſyklyke zeirly and termlie in tyme coming, during the nonredemtion of the ſamen, conform to the ſaid contract, and the ſaids Lordis decreit forſaid interponit thairto as ſaid is, within thrie days nixt after they be chargit be you thairto, under all higheſt paine and chairge that after may follow. THE SAIDS thrie days being bypaſt, and the ſaids perſons

* Firſt Form.

perſons diſobeyand, * That ye chairge them zit as of before, to obſerve, keip, and fulfill the forſaid contract and appointment to the ſaid Henry, in all and ſundrie pointis, partis and clauſis thairof, and ſpeciallie to mak paiment to him of the ſaid annualrent of twelve punds money forſaid, reſtand awand, of all zeirs and termis bygane, and ſyklyke zeirly and termlie in tyme comeing, during the nonredemtion thairof, conform to the ſaid contract, and decreit forſaid interponit thairto as ſaid is, within other 3 dais next after they be chargit be you thairto, under the paine of wairding thair perſonis. THE QUHILKS thrie dais being bypaſt, and the forſaids perſonis diſobeyand, † That ze chairge the diſobeyeris zit as of before, to obſerve keip and fulfill the ſaid contract and appointment to the ſaid Henrie, in all and ſundrie pointis pairtis and clauſis thairof, and ſpeciallie to mak payment to him of the ſaid annualrent of twelve punds money forſaid, reſtand awand, of all zeirs and termis

* Second Form. † Third Form.

termis bygane, and ſyklyke zeirlie and termlie in tyme coming during the nonredemption thairof, conform to the ſaid contract and decreit forſaid interponit thairto as ſaid is, within other thrie dais next after they and ilk ane of them be chargit be zou thairto; or elſe that they, within the ſamin thrie dais, paſs and enter thair perſonis in waird within oure caſtell of Dumbartane, thairin to remain upon thair awin expenceſs ay and quhill they haive fulfillit the comande of thir our letteris, and be freid be us thairfrae, under the pain of rebellion and putting of thaim to our horn; and that they cum to oure ſecretar or his deputtis, keipars of oure ſignet, and receive oure other letteris for thair reſaite in waird within oure ſaid caſtell. THE QUHILKS thrie dais being bypaſt, and the ſaids perſonis or ony of thaim diſobeyand, * That ze chairge the diſobeyeris zit as of before, to obſerve, keip, and fulfill the ſaid contract and appointment to the ſaid complainer, in all and ſundrie pointis,

* Fourth Form.

pointis partis and clauſis thairof; and ſpeciallie to make payment to him of the ſaid annualrent of twelve punds money forſaid, reſtand awand to him, of all zeirs and termis bygane; and ſiklike zeirly and termlie in tyme coming, during the nonredemtion thairof, conform to the ſaid contract and decreit forſaid interponit thairto, as ſaid is, within other three dais next after they be chargit be zou thairto; or elſe that they, within the ſamen three dais, paſs and enter thair perſonis in waird, within oure ſaid caſtell of Dumbartane, thairin to remaine upon thair awin expenceſs, ay and quhill they have fulfillit the command of thir our letteris, and be freid be us thairfrae, under the ſaid paine of rebellion and putting of thaim to oure horne; and that they cum to our ſaid ſecretar, or his deputtis, keipars of oure ſaid ſignete, and reſaive oure ſaid other letteris for thair reſaite in waird within oure ſaid caſtell. THE QUHILK laſt three dais of all being bypaſt, and the ſaids perſonis or ony of thaim diſobeyand, and

not fulfilland the command of thir oure letteris, nor zit enterand thair ſaids perſonis in wairde within oure ſaid caſtell as ſaid is, * That ze, incontinent thairafter, denunce the diſobeyeris our rebellis, and put thame to oure horne; and eſcheat and inbring all thair movable guidis to oure uſe for thair contemption; and immediately after zour ſaid denunciation, that ze mak intimation to the Schyrriff of oure Schyre whair our ſaids rebellis is, and ſyklyke to our theſaury and his clerkis, conform to oure act of parliament made thairanent. According to juſtice, as ze will anſwer to us thairupon; the quhilk to do, wee comitt to you conjunctly and ſeverally our full power be thir oure letters, delivering thaim be zou duely execute and indorſit againe to the bearer. Given under our ſignet att Edinburgh, the 17th day of *Junii*, and of our reign the 19th zeir 1586.

Ex deliberatione Dominorum concilii.

The

* Warrand to denounce.

The EXECUTIONS written on the back thus:

* UPON the 21 day of the month of Aprile, in the zeir of God 1591 zeirs, I Robert Howiſon meſſenger, paſt, att command of thir our ſoveraign Lordis letteris within-written, to the dwelling houſe of Helen Cornwall, within the burgh of Linlitgow, relict of umquhill Johnne Forreſt of Magdalane perſonallie, and ſyklike, to the dwelling houſe of Jerom Henderſon as cautioner and ſourtie for the ſaid John Forreſt and Helen Cornwall his relict, and I, conform to the tenor of the firſt chairge containit in thir letteris within written, in oure ſoveraign Lordis name and authoritie, commandit and chargit the foreſaid Helen Cornwall and Jerom Henderſon the cautioner perſonally, conjunctly and ſeverally, to obſerve, keep and fulfill the contract and appointment aforſpecifyed, to Henry Leir-

* Execution of Firſt Form.

month complainer, in all pointis partis and clauſis containit thairintill, and ſpecially to mak payment to him of the annualrent of xii *libs* money forſaid, reſtand awand to him, of all zeirs and termis bygane, conform to the tenor of the letteris, and ſyklyke zeirly in time coming during the nonredemtion of the landis containit in the forſaid contract, and the Lordes decreit interponit thairto, within thrie dais nixt after this my charge, under the heigheſt paine and chairge that after might follow; and this I did conform to the tenor of the firſt chairge in all points, before theiſe witneſſes, &c. Sign'd by the meſſenger only, and ſealed.

* UPON the 28 day of the month of Aprile, I Robert Howiſon meſſenger, zit as of before, paſt att command of thir oure ſoveraign Lordis letteris afforſpecifyed, and I perſonally apprehended Helen Cornwall relict of umquhill John Forreſt and Jerom Henderſon

* Of Second.

Henderſon the cautioner, and I, conforme to the tenor of the ſecond chairge containit thairintill, commandit and chargit thaim, and ilk ane of thaim, in all pointis, and this within other thrie dais nixt after this my chairge, under the paine of wairding of thair perſonnis: This I did before theſe witneſſes, &c. And for verification of this my ſecond chairge I have ſubſcribit the ſamin, and affixit my ſignet thairto. Signed and ſealed as before.

* UPON the 3d day of the month of May, and yeir of God aforwritten, I Robert Howiſon meſſenger, zit as of before, paſt to the perſonal preſence of Helen Cornwall relict of umquhile John Forreſt, and ſyklyke to the perſonal preſence of Jerom Henderſon, and I, conforme to the tenor of the third charge containit in the former letteris, commandit and chargit them, in our ſoveraign Lordis name, to obſerve the ſamin within other thrie dais, or elſe that

* Of Third.

that thay within the ſaid thrie dais paſs and enter thair perſonis in waird within the caſtell of Dumbartane, thair to remain upon thair own expenceſs, ay and quhile they have fulfillit the command of thir letteris, and be freed orderlie thairfrae, under the paine of rebellion and putting of thaim to the horne, and that thay cum to the ſecretar or his deputtis, keepars of the ſignette, and reſaive other letteris for thair reſaite and waird within the ſaid caſtle: And this I did conform to the tenor of the third chairge containit thairintill in all pointis. And this I did before thaiſe witneſſes, &c. Signed by the meſſenger only and ſealed.

* UPON the 8th day of the month of May, and zeir of God forſaid, I Robert Howiſon meſſenger, zet as of before, paſt to the perſonal preſence of Helen Cornwall relict of umquhill John Forreſt, and ſyklyke to the perſonal preſence of Jerom Henderſon the cautioner, and I, conform to

* Of Fourth.

to the tenor of the fourth chairge contained in the former letteris, I commandit and chairgit them, in oure ſoveraign Lordis name and authoritie, to obſerve the ſamen within letteris thrie dais next after my chairge, or elſe that they within the ſaid thrie dais paſs and enter thair perſonnis in waird within the caſtell of Dumbartane, thair to remain upon their ain expences ay and while they hae fulfillit the command of thir letteris, and be freed orderlie thairfrae, under the pain of rebellion and putting of them to the horne, and that they cum to the ſecretar, keipar of the ſignet, and reſaive other letteris for their reſaite and waird within the ſaid caſtell: And this I did conform to the tenor of the fourth chairge containit thairintill in all pointis. This I did before thir witneſſes,&c. Sign'd &c. as before.

* UPON the 21 day of the month of May, and zeir of God foreſaid, I Robert Howiſon meſſenger, perſonally apprehended Helen

* Intimation.

Helen Cornwall foreſaid and Jerom Henderſon, and I maide intimation to ilk ane of thaim, that I would denounce them oure ſoveraign Lordis rebellis, and put them to his heighneſs horn. This I did before thir witneſſes, &c. Sign'd by the meſſenger, but not ſealed.

* UPON the 22 day of the month of May and zeir of God foreſaid, I Robert Howiſon meſſenger, paſt to the mercate corſe of the burgh of Linlitgow, and thair, be open proclamation be thrie blaſts of ane horne, as uſe is, I denounced, and put to oure ſoveraign Lordis heighneſs horne, Helen Cornwall relict of umquhill John Forreſt and Jerom Henderſon the cautioner, and this conform to the tenor of thir letteris in all partis: This I did before thir witneſſes, &c. And for the verification of this and my former executions I haive ſubſcribit thir preſents with my hand, and affixit my ſignet thairto. Sign'd, &c.

Apud LINLITGOW, die ſexto menſis Junii 1591, regrat. per

NOTES

* Denounciation.

NOTES of Letters of four forms.

*JAMES, &c. Foraſmeikleas (here is narrated a decreit obtain'd before the commiſſars of Edinburgh, att the inſtance of Robert White, againſt Sir James Crichton, decerning him to pay *L.* 162. Scots of principal, and *L.* 4. of expences; and that Robert White had thereupon raiſed the commiſſar's precept, and cauſed chairge the ſaid Sir James Crichton to pay to him the ſaids ſums, within 15 days, under the pain therein contain'd, as the ſaid precept, ſhawin to the Lords, &c. teſtified: In and to which decreet precept and ſums Robert Scott, &c. has right by aſſignation, &c. notwithſtanding whereof the ſaid Sir James Crichton has noways fulfillit, nor will fulfill to the ſaid complainer as aſſigney forſaid, the forſaid decreet and precept raiſed thereupon, with-

* Regiſtred 19th September 1610.

out he be furder compellit.) Our will is, *&c.* command and chairge the ſaid Sir James Crichton to content and pay to the ſaid complainer, the ſums of money abovewritten, after the form and tenor of the ſaid decreet and precept, in all points, within 3 days next after the charge, under all higheſt pain, *&c.* which 3 days being paſt, to charge him within other 3 days. And ſo on as in common letters of 4 forms.

THERE is another regiſtred 12th September, at the inſtance of James Wardlaw, againſt James Earle of Murray, proceeding upon a decreet before the Lords of councill and ſeſſion, for 4000 merks, dated 2d March 1610, which decreet the ſaid Earle will not obtemper and fulfill. Our will, *&c.* charge him within three days, *&c.* as in common letters of four forms. Given under our ſignette, penult day of *Maii, &c.* 1610.

Ex deliberatione Dominorum concilii.

THIS

THIS it ſeems has paſt upon a bill, although proceeding upon a decreet of the Lords.

NUMBER VIII.

CARTA RICARDI KINE*, referred to vol. II. p. 119.

JACOBUS, &c. Quia direximus literas noſtras Vicecomiti noſtro de Selkrig, ad inveſtigandum et perquirendum terras *quondam* Patricii Wallance, ubicunque infra bondas officii, et appretiari faciendum eaſdem in quantum ſe extendunt, pro relevio dilecti Ricardi Kine, noſtri coronatoris Vicecomitatus de Selkrig, de ſumma viginti librarum, in qua adjudicatus erat pro dicto Patricio ſecundum tenorem acti adjornalis noſtri, prout in eiſdem literis noſtris ſub ſigneto noſtro deſuper decretis plenius continetur. Pro quarum executione Joannes Murray de Fallahill, Vicecomes noſter deputatus de Selkrig, accedens invenit unam terram

* Lib. 16. No. 77. 1508. 29th January.

terram huſbandiam nuncupatam Burges Walleys in burgo noſtro de Selkrig, eidem *quondam* Patricio in hereditate ſpectantem. Et ibidem, apud capitale meſſuagium dictæ terræ huſbandiæ, dictus noſter Vicecomes deputatus *heredes dicti quondam* Patricii, et ceteros omnes ad præfatam terram intereſſe habentes, legitime premonuit, viceſimo die menſis Septembris 1508, ad comparendos coram ipſo vicecomite, vel deputatis ſuis, ſuper ſolum dictæ terræ, tertio die menſis Octobris anno præſcripto, ad audiendum prefatam terram huſbandiam appretiari, pro relevio dicti Ricardi et terrarum ſuarum, quæ pro dicta ſumma *L.* 20. appretiatæ fuerunt. Quo tertio die Octobris dictus noſter vicecomes deputatus comparuit ſuper ſolum dictæ terræ huſbandiæ, et ad capitale meſſuagium ejuſdem, curiam vicecomitatus noſtri de Selkrig affirmari fecit, et in eadem, *hæredibus dicti Patricii* et cæteris omnibus ad prefatas terras intereſſe habentibus, ad audiendum eandem terram ut præmittitur appretiari, legitime vocatis, et non comparentibus,

rentibus, dictus noſter vicecomes, per tres decem condignas perſonas ad hoc electas, pro predicta ſumma *L.* 20. eo quod dicta terra huſbandia ad viginti ſolidos terrarum ſe extendit, legitime appretiari fecit. Qua quidem terra ſic ut præmittitur appretiata, dictus vicecomes eandem *hæredibus dicti quondam Patricii*, ſeu cuicunque ipſam pro predicta ſumma emere volenti, publice vendendam obtulit. Et quia nullam perſonam dictam terram pro præfata pecunia emere volentem invenit, idem noſter vicecomes, virtute ſui officii, prædictam terram huſbandiam aſſignavit dicto Ricardo, in plenariam contentationem et ſolutionem dictæ ſummæ viginti librarum, pro ipſius relevio de eadem, ſecundum tenorem acti noſtri parliamenti. Volumus et ordinamus quod hæredes dicti quondam Patricii habeant regreſſum per ſolutionem infra ſeptennium.

CHARTER

NUMBER IX.

CHARTER of APPRISING*, referred to vol. II. p. 124.

MARIA, &c. omnibus, &c. ſciatis quia literas noſtras, per dilectum clericum conſiliariumque noſtrum magiſtrum Henricum Lauder noſtrum advocatum, impetratas, dilectis noſtris Wilielmo Champnay nuncio vicecomiti noſtro in hac parte et aliis direximus, mentionem in ſe proportantes, quod ipſe noſter advocatus decretum coram concilii noſtri dominis contra et adverſus Matheum comitem de Levinax nuper obtinuit, noſtras literas ſuper ipſo decernentes ad compellendum, namandum, et diſtringendum ipſius terras et bona pro ſumma 10000 *l.* monetæ regni noſtri, ſecundum formam ſuæ obligationis in libris concilii noſtri regiſtrat. prout hujuſmodi decretum

* Thirty firſt Book of Charters, No. 294.

latius proportat. Et quia dictus comes introitum ad terras ſuas et hereditates tempore promulgationis dicti decreti minime obtinuit, ſed ad fruſtrandam executionem ejuſdem ad eaſdem intrare noluit, idem noſter advocatus, per ſupplicationem noſtri concilii dominis porrectam, alias noſtras literas impetravit, virtute quarum dictum comitem precepit, quatenus ad predictas ſuas terras et hereditates intra viginti et unam dies intraret, ad effectum, ut hujuſmodi decretum debite executioni demandaretur, eidem certificantes, quod ſi in id defecerit, lapſis dictis viginti et una diebus, quod prædictæ ſuæ terræ et hereditates, pro ſolutione dictæ ſummæ, eodem modo ſicut ad eaſdem introitum habuiſſet, nobis appretiarentur, et appretiatio earundem ita legitima foret, ac ſi dictus comes introitum ad eaſdem legitime habuiſſet, prout prefatæ aliæ literæ noſtræ in ſe latius proportant. Quibus idem comes obtemperare minime voluit, prout in hujuſmodi noſtris literis, et in earundem executione, plenius continetur. QUAPROPTER dicti

comitis

comitis terræ et hereditates pro dicta ſumma appretiari debebunt, veluti in eiſdem infeodatus hereditarie fuiſſet, et terræ ejuſdem quas dictus advocatus appretiari cauſaret, jacentes infra vicecomitatum noſtrum de Renfrew, et ob magnas curas nobis pro publica concernentes ſibi commiſſas in iſtis partibus tractandas, pro dictis terris appretiandis, ad vicecomitem noſtrum de Renfrew antedictum accedere minime poterat, ideo alias literas noſtras, dicto Wilielmo et aliis ſuis collegis vicecomitibus noſtris in hac parte, direximus ad denunciandas terras et hereditates dicti Mathei comitis, pro dicta ſumma nobis appretiari; et ad hunc effectum curias infra prætorium noſtrum de Edinburg. affigere et tenere, et ibidem ſupra appretiatione earundem procedere, ac ſi dictus comes legitimum introitum habuiſſet ſecundum tenorem aliarum noſtrarum literarum prius deſuper directis, et ad præmoniendum eundem, per publicam proclamationem apud cruces forales burgorum noſtrorum de Renfrew et de Edinburgo reſpective,

ſpective, ſuper 60 dierum premonitione, ad videndum et audiendum hujuſmodi appretiationem legitime fieri et deduci, eo quod ipſe comes nunc extra regnum noſtrum extat, et penes loco deſuper diſpenſando, et predictum pretorium noſtrum de Edinburgo et crucem foralem ejuſdem, ita legitima pro hujuſmodi appretiationis deductione ſint, quam pretorium et crux foralis burgi noſtri de Renfrew ubi predictæ terræ jacent, pro cauſis ſupraſcriptis admittendo, prout in dictis noſtris literis memorato Wilielmo et ſuis collegis deſuper directis latius continetur. Virtute quarum—and ſo the charter goes on to mention the denunciation of the lands to be appriſed, and the appriſing of the ſame, 13th May 1544, and the allowance of the appriſing, and the giving the land to the Maſter of Semple,&c. dated 24th May 1547.

FINIS.